Supreme Court, U.S.
FILED

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No.

IN THE

# Supreme Court of the United States

ELEANOR CAPOGROSSO, PETITIONER,

*v.*

THE NEW YORK STATE COMMISSION
ON JUDICIAL CONDUCT ET AL.

*PETITION FOR A WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE SECOND CIRCUIT*

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Does the district court's *sua sponte* dismissal of petitioner's complaint without notice and without the opportunity to replead deny her due process?

2. Was Circuit Judge Wesley bound to recuse himself from hearing this appeal?

## PARTIES TO THE PROCEEDING

Eleanor Capogrosso, *Petitioner*,

The New York State Commission on Judicial Conduct, The State of New York; The Office of Court Administration of the Unified Court System; The Appellate Division, First Department, Departmental Disciplinary Committee; Hon. Fern Fisher Brandveen, in her official and individual capacities; Hon. Eileen Bransten, in her official and individual capacities; Hon. John T. Buckley, in both his official and individual capacities; Hon. Joan B. Carey, in her official and individual capacities; Sherry K. Cohen, in her official and individual capacities; Paul J. Curran, in his official and individual capacities; Hon. Carol R. Edmead, in her official and individual capacities; Raoul Felder, in his official and individual capacities; Hon. Judith Gische, in her official and individual capacities; Sarah Jo Hamilton, in her official and individual capacities; Hon. Debra James, in her official and individual capacities; Hon. Judith S. Kaye, in her official and individual capacities; Hon. Joan M. Kenney, in her official and individual capacities; Catherine O'Hagan Wolfe, in her official and individual capacities; Hon. Jeffrey K. Oing, in his official and individual capacities; Hon. Eileen A. Rakower, in her official and individual capacities; Sherrill Spatz, in her official and individual capacities; Hon. Martin A. Shulman, in his official and individual capacities; Hon. Geoffrey D. Wright, in his official and individual capacities; John Doe 1-20; Jane Doe 1-20; The Appellate Division, First Department, Departmental Disciplinary Committee; and Thomas J. Cahill, in his official and individual capacities, *Respondents.*

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## OPINIONS BELOW

The unpublished summary order of the Court of Appeals for the Second Circuit in *Eleanor Capogrosso v. State Commission on Judicial Conduct et al.*, C.A. No. 08-4719, filed October 30, 2009, affirming the district court's *sua sponte* dismissal of petitioner's amended complaint, is set forth in the Appendix hereto(App.1-3).

The unpublished opinion of the U.S. District Court for the Southern District of New York, Scheindlin, J., in *Eleanor Capogrosso v. State Commission on Judicial Conduct et al.*, C.A. No. 5455(SAS), filed August 8, 2008, dismissing *sua sponte* petitioner's amended complaint, is set forth in the Appendix hereto(App. 4-51).

The unpublished Order of the United States District Court for the Southern District of New York, Scheindlin, J., in *Eleanor Capogrosso v. State Commission on Judicial Conduct et al.*, C.A. No. 5455(SAS), August 27, 2008, denying the petitioner's motion for reconsideration, is set forth in the Appendix hereto(App. 52-55).

The unpublished Order of the Court of Appeals for the Second Circuit in *Eleanor Capogrosso v. State Commission on Judicial Conduct et al.*, C.A. No. 08-4719, filed December 29, 2009, denying petitioner's petition for panel rehearing or for rehearing *en banc*, is set forth in the Appendix hereto(App. 56-57).

## JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit affirming the district court's *sua sponte* dismissal of petitioner's amended complaint, was entered on October 30, 2009(App. 1-3). Its further Order denying petitioner's timely filed petition for panel rehearing or for rehearing *en banc* was filed and decided on December 29, 2009(App. 56-57).

This petition for writ of certiorari is filed within ninety (90) days of the date the court of appeals denied petitioners' timely filed petition for rehearing or for rehearing *en banc*. 28 U.S.C. § 2101(c). Supreme Court Rule 13.3. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

## RELEVANT PROVISIONS INVOLVED

*United States Constitution, Amendment V:*

> No person...shall be deprived of life, liberty, or property, without due process of law....

*United States Constitution, Amendment VII:*

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

*United States Constitution, Amendment XI:*

> The Judicial power of the United States shall not be construed to extend to any suit in law or in equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

*United States Constitution, Amendment XIV, § 1:*

> ...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law....

*28 U.S.C. § 1331:*

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

*28 U.S.C. § § 1343(a)(3) & (4):*

> (a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
> ...
> (3) To redress the deprivation, under color of any State aw, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for

equal rights of citizens or of all persons within the jurisdiction of the United States;
(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

*28 U.S.C. § 455:*

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
(b) He shall also disqualify himself in the following circumstances:
(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of a disputed evidentiary facts concerning the proceeding;
....
(5) Where he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such person
...
(iv) is to the judge's knowledge likely to be a material witness in the proceeding.

*Civil Rights Act–42 U.S.C. § 1983:*

Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of theUnited States or other person within the jurisdiction thereof to the deprivation of any

> rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

*Fed. R. Civ. P. 1:*

> [The federal rules of civil procedure] ...shall be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.

*Fed. R. Civ. P. 7(b)(1):*

> (1) *In General.* A request for a court order must be made by motion....

*Fed. R. Civ. P. 8(a)(1) & (2):*

> **(a) Claims for relief.** A pleading that states a claim for relief must contain:
> (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;
> (2) a short and plain statement of the claim showing that the pleader is entitled to relief....

*Fed. R. Civ. P. 12(b)(6):*

> ...[T]he following defenses may at the option of the pleader be made by motion:...(6) failure to state a claim upon which relief can be granted....

*Fed. R. Civ. P. 15(a)(1) & (2):*

> **(a) Amendments Before Trial.**
> (1) *Amending as a Matter of Course.* A party may amend its pleading once as a matter of course:
> (A) before being served with a responsive pleading; or
> (B) within 20 days after serving the pleading if a responsive pleading is not allowed and the action is not yet on the trial calendar.
> (2) *Other Amendments.* In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

*Article VI, § 22, Const. of the State of New York:*

> There shall be a commission on judicial conduct. The commission on judicial conduct shall receive, initiate, investigate and hear complaints with respect to the conduct, qualifications, fitness to perform or performance of official duties of any judges or justice of the unified court system, in the manner provided by law; and, in accordance with subdivision d of this section, may determine that a judge or justice be admonished, censured or removed from office for cause, including, but not limited to, misconduct in office, persistent failure to perform his or her duties, habitual intemperance and conduct, on or off the bench, prejudicial to the administration of justice, or that a judge or justice be retired for mental or

physical disability preventing the proper performance of his or her judicial duties.

*New York Judiciary Law, § 44(1):*

> The commission shall receive, initiate, investigate and hear complaints with respect to the conduct, qualifications, fitness to perform, or performance of official duties of any judge, and, in accordance with the provisions of subdivision d of section twenty-two of article six of the constitution, may determine that a judge be admonished, censured, or removed from office for cause, including, but not limited to, misconduct in office, persistent failure to perform his duties, habitual intemperance and conduct, on or off the bench, prejudicial to the administration of justice, or that a judge be retired for mental or physical disability preventing the proper performance of his judicial duties.

*New York Judiciary Law, § 90(2):*

> The supreme court shall have power and control over attorneys and counselors-at-law and all persons practicing or assuming to practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counselor-at-law admitted to practice who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice; and the appellate

division of the supreme court is hereby authorized to revoke such admission for any misrepresentation or suppression of any information in connection with the application for admission to practice.

## STATEMENT

In 1997, petitioner Eleanor Capogrosso ("petitioner"), an attorney duly licensed to practice law in New York, retained the law firm of Gentile and Benjamin to defend an action brought against her by another attorney, Gregory Calabro, involving a fee dispute(App. 16). Both Michael Gentile and Howard Benjamin were formerly associated with the Department Disciplinary Committee of the New York State Supreme Court Appellate Division, First Department ("the DDC"), a state body charged by law with investigating and enforcing attorney discipline. Gentile had been its Chief Counsel for nine years and Benjamin had been a staff attorney.

When a default entered against her on account of Benjamin's unexcused failure to appear on her behalf, petitioner asked Benjamin to move to vacate the default(App. 16). He refused, promising instead to pay the judgment himself(App. 16). As time passed, petitioner's credit report and other business opportunities began to be affected negatively by this unsatisfied default judgment and it prompted petitioner to ask both Calabro and Benjamin for evidence that the judgment had been paid(App. 16). Neither one did so and petitioner in 2001 filed a grievance against both Calabro and Benjamin with the

DDC, for failing to maintain bank records for the requisite period of time(App. 16).

Respondent Sarah Jo Hamilton, First Deputy Chief Counsel for the DDC, transferred petitioner's grievance to another disciplinary jurisdiction, the Fourth Department DDC, which eventually closed the complaint against Benjamin without investigating the reason why Benjamin did not appear in court on petitioner's behalf, causing the default judgment, and without obtaining copies of the cancelled check(s)(App. 16). Petitioner then began a civil action against Calabro under the Fair Credit Reporting Act in an attempt to have him remove the judgment appearing on her credit report(App. 16). In response, Calabro sought in discovery proof in the form of cancelled checks that he already had been paid, as petitioner alleged(App. 16).

In addition, petitioner brought another complaint against Benjamin with the DDC based upon his failure to produce proof that he had paid the default judgment against petitioner consistent with his promise to do so(App. 16). Respondent Thomas J. Cahill, Chief Counsel for the DDC, referred petitioner's complaints against Calabro and Benjamin to mediation(App. 16).

While petitioner's DDC complaints against Calabro and Benjamin were pending, respondent Hon. Joan M. Kenney, the presiding justice in petitioner's civil action against Calabro, dismissed the action(App. 16-17). In the course of dismissing petitioner's action, respondent Kenney unfairly castigated petitioner by asserting falsely that she had prosecuted some thirty-five lawsuits as a *pro se* litigant since1998, insinuating

that these lawsuits were frivolous(App. 17). These remarks by Kenney were published in the *New York Law Journal*, damaging petitioner's reputation in the legal community and causing petitioner harm in other courts before other judges, including respondent Hon. Judith Gische who openly criticized petitioner during one of her cases for being a litigious pro se party, remarks which adversely affected petitioner's handling of the civil action she had before Judge Gische(App. 18-19).

Based upon Judge Kenney's dismissal of petitioner's civil action against Calabro, the DDC cancelled the mediation of petitioner's complaints against Calabro and Benjamin(App. 16-17). In the meantime, both Cahill and Hamilton of the DDC promised petitioner that her continuing complaints against Calabro and Benjamin seeking his production of the cancelled check(s) would be addressed and by June 3, 2003, the DDC was anticipating retrieving the checks and securing Calabro's agreement that he had been paid. Petitioner's credit report continued to be affected negatively while this matter remained unresolved.

By August of 2003, petitioner still had not received the cancelled checks and she began anew to request various state court judges with supervisory power in the DDC (Hon. John T. Buckley; Hon. Judith S. Kaye) and others for help and oversight in having the DDC investigate and resolve this matter(App. 17-18). By February of 2004, petitioner's pending complaints against Calabro and Benjamin were still open and undecided. However, on February 27, 2004, the DDC forwarded to petitioner original affirmations from Calabro and Benjamin attesting to the fact that

the judgement against her was satisfied on or about February 1, 1998. Xeroxed copies of Benjamin's checks were enclosed in this fax transmission(App. 17-18).

By letters of November 8, 2004, the DDC through respondent Cahill, its Chief Counsel, wrote petitioner that the DDC had completed its investigation of both Calabro and Benjamin incident to her complaints and had determined that neither one had engaged in misconduct warranting the imposition of discipline(App. 18). In fact, the DDC told petitioner that after she filed her complaint, Benjamin provided the DDC with copies of some of the checks as well as his transmittal letters to Calabro with the understanding "that the DDC would attempt to obtain records from the bank showing deposit of the checks...."(App. 18). Petitioner unsuccessfully asked respondent DDC Chairman Paul J. Curran for a reconsideration of the DDC's decision refusing to find misconduct; and she unsuccessfully sought an explanation from various state judges with supervisory power over the DDC as to the reason it took more than three years to resolve this matter when Benjamin had provided the DDC with checks shortly after her complaint was filed in 2001(App. 18).

In the wake of this experience with the DDC, petitioner became aware in 2008 that her experience was typical of DDC's investigation of highly influential attorneys such as Gentile and Benjamin who have close ties to the DDC, the judiciary and other state employees. As she later alleged, her right to a fair hearing on her DDC complaints against Calabro and Benjamin was precluded by these close relationships; DDC personnel in collaboration with state court judges

exerted improper influence in its decisionmaking process and prevented a fair resolution of complaints brought to it, including her two complaints against Calabro and Benjamin(App. 19).

Besides this episode of official malfeasance by DDC and its related State actors, petitioner experienced other instances of unequal treatment by State judges, especially in the wake of respondent Kenney's unfair castigation of petitioner by asserting falsely that she had prosecuted some thirty-five lawsuits as a *pro se* litigant since1998, insinuating that these lawsuits were frivolous(App. 17). These remarks by Kenney, published in the *New York Law Journal*, damaged petitioner's reputation in the legal community and caused petitioner harm in other courts before other state court judges.

Petitioner' office was located near the World Trade Center and the terrorist attack in lower Manhattan on September 11, 2001, disrupted not only her ability to work but also the state court trial and motion calendars(App.17). Despite the Governor's executive order allowing the suspension of court deadlines in the aftermath of the attack and Chief Judge Judith S. Kaye's procedural directive extending court deadlines for those directly affected, respondent Hon. Eileen Rakower on October 10, 2001, refused petitioner's request for an adjournment (because of the disruption of her office) to oppose a motion to reopen a default which had entered against her opponent(App. 18).

With the Governor's executive order and Chief Judge Kaye's procedural directive still in effect,

Respondent Hon. Carol R. Edmead likewise refused petitioner an adjournment on December 17, 2001, in petitioner's separate action against Benjamin and granted his motion to dismiss her complaint with prejudice and by default even though her office still was unable to function because of the attack(App. 17). Respondent Jeffrey K. Oing upheld the entry of default and respondent Hon. Geoffrey D. Wright denied petitioner's motion to reargue this decision(App. 17). Respondent Hon. Martin A. Shulman considered petitioner's order to show cause concerning Judge Wright's decision but did not take any corrective action because, in part, the file had disappeared from the Clerk's office(App. 17).

Neither respondent Hon. Fern Fisher Brandveen nor respondent Hon. Joan B. Carey responded to petitioner's complaint that all of these judges had "ignored Executive Orders from then-Governor George Pataki and the procedural directives from Chief Judge...Kaye...."(App. 17). Finally, petitioner notified Carrie Cohen, Chief of the Public Integrity Unit of the Office of the Attorney General together with respondent Sherill Spatz, Inspector General, but neither took any action(App. 17).

In addition, respondent Hon. Debra James dismissed without reason petitioner's malpractice action she had brought against her former attorney and enjoined petitioner from initiating any other civil action without approval from the administrative judge, noting that petitioner had challenged the integrity of other judges(App. 18). Finally, respondent Hon. Eileen Bransten allowed petitioner's own counsel to withdraw from a civil action (because of the judge's friendship

with counsel) but then ordered petitioner to appear for a deposition without counsel(App. 19). When she refused, Judge Bransten made petitioner responsible for the court reporter fee and dismissed petitioner's complaint (App. 19).

On July 17, 2008, petitioner brought a civil action against all these respondents in the federal district court for the Southern District of New York(App. 5;16-20). Alleging all of the aforementioned facts and positing jurisdiction of the federal court on 28 U.S.C. §1343(a)(3) & (4), petitioner in an amended 57-page complaint brought under 42 U.S.C. § 1983, claimed that the DDC personnel together with the judges who supervise its activity as well as the Office of Court Administration ("the OCA") engaged in a conspiracy to violate her due process rights incident to their processing of her complaints against Calabro and Benjamin; and that the DDC, its Chief Counsel, the OCA and Judge Kaye are liable for their negligent supervision of this unfair and discriminatory process(App. 19).

Petitioner claimed that the State Commission on Judicial Conduct ("SCJC"), its chairman, as well as all of the state judges who refused to provide relief from adverse decisions in her cases following September 11, 2001, engaged in a conspiracy to "hinder public and legal justice in the State of New York...all in retaliation because [petitioner] filed complaints and letters about the defendants' repeated contempt of Executive orders and Directives"(App. 19-20). She claimed that Judges Kenney and James made false public statements about her leading to unfair decisions against her by other

state judges, including Judges Gische and Bransten(App. 20).

Petitioner further claimed that Chief Judge Kaye together with nine other state court judges engaged is a separate conspiracy to obstruct justice and that Spatz, the OCA, the State of New York, and Judges Shulman, Brandveen and Carey as well as Chief Judge Kaye are responsible for negligent supervision(App. 20).

Finally, petitioner claimed that Section 44 of New York's Judiciary Law providing for the oversight, investigation and discipline of judges by the SCJC upon a finding of misconduct denies her due process and the equal protection of the laws because its proceedings are not made public, there are no promulgated standards of decisionmaking for a finding of misconduct, there is no right to appeal and its decisions are not otherwise subject to review or oversight(App. 20). Petitioner sought damages, a declaration that Section 44 of New York's Judiciary Law is unconstitutionally void and other equitable relief. A jury trial was also demanded on all issues so triable.

On August 8, 2008, the District Court, Scheindlin, J., *sua sponte* dismissed petitioner's amended complaint along with five other complaints challenging the procedure which the DDC employs to process, investigate and decide complaints against attorneys for alleged misconduct(App. 4-51). As the district judge ruled, it does not have jurisdiction to oversee the decisions of the DDC; that power lies with the United States Supreme Court(App. 5). The district court also ruled that dismissal was warranted on the

grounds that the Eleventh Amendment bars such suits; that judicial immunity applies to these allegations; that the *Rooker-Feldman* doctrine renders these issues unreviewable by a federal district court; and that petitioner has no constitutional right to have her grievances investigated and therefore no standing to assert that Section 44 of New York's Judiciary Law is unconstitutional(App. 25-32).

Since any amendment to petitioner's amended complaint would be futile, the motion judge denied petitioner the opportunity to replead (App. 33). On August 27, 2008, the district judge denied petitioner's motion for reconsideration(App. 52-55).

On October 30, 2009, the court of appeals in a summary order affirmed the district court's dismissal citing the Eleventh Amendment, the doctrine of judicial immunity, the *Rooker-Feldman* doctrine and because petitioner failed to allege a deprivation of a "right, privilege, or immunity secured by the Constitution or laws of the United States"(App. 1-3).

On December 29, 2009, the court of appeals denied petitioner's timely filed petition for rehearing or for rehearing *en banc*(App. 56-57).

## REASONS FOR GRANTING THE PETITION

**1. The District Court's *Sua Sponte* Dismissal of Petitioner's Complaint Without Notice And Without Giving Her The Opportunity To Replead Denied Her Due Process And A Fair Hearing On Her Claims.**

The Federal Rules of Civil Procedure "shall be construed and administered to secure the *just*, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1(emphasis supplied). The right of every litigant to adequate notice and the opportunity to respond in a meaningful way to challenges to her pleadings or proof is deeply embedded in the Federal Rules' concept of fair play and substantial justice. See *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1,13-14(1978); *Arnett v. Kennedy*, 416 U.S. 134, 142-146(1974); *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 314(1950). This reflects the fundamental principle of judicial administration that a person is entitled to notice before adverse judicial action is taken against him. See generally *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694,707(1988).

For instance, Rule 7(b) requires that applications to the court be made by motion in writing; Rule 6(c) requires that, in general, these motions be served at least 14 days before the hearing; Rule 56(c) (1)(B) gives a party opposing summary judgment 21 days to file a response after the motion is served; and Rule 12(d) explicitly provides that if, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion

must be treated as one for summary judgment under Rule 56 so that "all parties [are] given a reasonable opportunity to present all the material that is pertinent to the motion." These embedded notions in the Federal Rules of notice and an opportunity to respond before judicial action is taken are founded on the principle that a plaintiff's cause of action and her right to have her claims fairly heard and decided in federal court is a valuable property right entitled to due process protection. *Board of Regents v. Roth*, 408 U.S. 564, 571-572(1972).

A procedure by which the district court dismisses a plaintiff's complaint *sua sponte* without notice and without giving the plaintiff the opportunity to respond or replead her claims runs afoul of the Rules' fundamental requirements of fair play and substantial justice. It bespeaks a unilateral and final decision by a district court without motion to deny a plaintiff her day in court on her claims. The notice requirement is meant not as a restriction on the moving party but rather as a device for securing an opportunity for the non-moving party to muster her best argument, to plan her strategy, to put her best foot forward and to help the district court secure a just determination under the Rules. For these reasons, the Second Circuit itself has repeatedly held that a "[f]ailure to afford plaintiffs an opportunity to address the court's *sua sponte* motion to dismiss is, by itself, grounds for reversal." See, e.g., *Abbas v. Dixon*, 480 F.3d 636, 639-640(2nd Cir. 2007); *Acosta v. Artuz*, 221 F.3d 117, 124(2nd Cir. 2000); *Square D Co. v. Niagra Frontier Tariff Bureau, Inc.*, 760 F.2d 1347, 1365(2nd Cir. 1985); *Lewis v. New York*, 547 F.2d 4, 6 n.4(2nd Cir. 1976).

The *sua sponte* dismissal of civil actions is "bad practice" for several reasons. First, it renders it impossible for the district court to be an independent decisionmaker; instead, it becomes a proponent for dismissal on grounds neither raised nor argued by any party, overlooking valid answers to its perception of defects in the plaintiff's case. *Snider v. Melindez*, 199 F.3d 199 F.3d 108, 113(2nd Cir. 1998). *Eades v. Thompson*, 823 F.2d 1055, 1061-1062(7th Cir. 1987). As Justice Scalia observed, "[t]he rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one." *United States v. Burke*, 504 U.S. 229, 246(1992)(Scalia, J., concurring).

Second, it may ultimately waste, rather than economize, judicial resources by producing appeals and remands which might otherwise be avoided. *Perez v. Ortiz*, 849 F.2d 793, 797(2nd Cir. 1988). Third, it prejudices plaintiffs by depriving them of the generous opportunity to amend their complaints under Fed. R. Civ. P. 15(a) in order to replead their claims with more precision, if necessary. *Abbas v. Dixon*, 480 F.3d at 640. *Lugo v. Keane*, 15 F.3d 29, 31(2nd Cir. 1994). *Square D Co. v. Niagra Frontier Tariff Bureau, Inc.*, *supra*. *Schlesinger Inv. v. Fluor Corp.*, 671 F.2d 739, 743(2nd Cir. 1982).

The district court failed to heed this persuasive law and policy when it dismissed petitioner's complaint without notice and without giving her the opportunity to respond or to replead her allegations, if necessary(App. ). The dismissal was in a ruling

common to *six* separate pending civil actions in the district court alleging *inter alia* corruption, unequal treatment and a lack of due process in the way New York acts or fails to act in investigating and disciplining alleged wrongdoing by attorneys practicing there----a circumstance which itself compounds the unfairness of this summary procedure. See *Perez v. Ortiz*, 849 F.2d at 797. The court of appeals' ratification of this *sua sponte* procedure with its own summary affirmance is in conflict with the decisions of this Court and warrants the grant of a writ of certiorari in the exercise of the Court's superintendency role over the federal courts, the federal system and our constitutional republic to formulate rules for hearings and motions so that these rules of practice and procedure provide the litigants with due process in their reach and result. *Klapprott v. United States*, 335 U.S. 601, 611 (1949)(Black, J.) citing *McNabb v. United States*, 318 U.S. 332, 341(1943).

*1. The Proceedings Below Denied Petitioner Due Process.* The *sua sponte* dismissal together with the summary affirmance by the court of appeals denied petitioner procedural due process, including a lack of adequate notice and the denial of a fair hearing on contested fact issues. See *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1,13-14(1978). *Withrow v. Larkin*, 421 U.S. 35, 46-47(1975). *Ward v. Monroeville*, 409 U.S. 57, 61-62(1972). *Willner v. Committee on Character and Fitness*, 373 U.S. 96, 103-104(1963). As the Court stated in *Societe Internationale Pour Participations Industrielles et Commerciales S.A. v. Rogers*, 357 U.S. 197, 209(1958), "[t]here are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a

party the opportunity for a hearing on the merits of his case."

"[I]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross examine adverse witnesses." *Goldberg v. Kelly*, 397 U.S. 254, 269-270(1970) citing *ICC v. Louisville & N. R. Co.*, 227 U.S. 88,93-94(1913) and *Willner v. Committee on Character and Fitness*, 373 U.S. 96, 103-104(1963). The right to cross-examine and confront adverse witnesses and their evidence in this context implies the right to marshal and adduce one's own evidence in opposition to the proposed adverse judicial action or the opportunity to submit a redrafted, amended complaint alleging with more particularized facts, if necessary, that respondents caused petitioner constitutional injury under § 1983. This due process right carries with it the right to have *all* relevant allegations and evidence adduced on this issue before a decision to dismiss the allegations is made. Petitioner was denied this right.

Moreover, the *sua sponte* ruling against petitioner by the district court----and its ratification by the court of appeals----has deprived petitioner of the jury trial guaranteed her on contested fact issues material to her claim. As Justice Scalia observed in *Blakely v. Washington*, 542 U.S.296, 305-306(2004), the right to a jury trial in civil cases is no mere procedural formality but rather a fundamental "reservation of power in our constitutional structure," assuring the people's ultimate control of the judiciary. *Id.* citing 2 *The Complete Anti-Federalist* 315, 320(H. Storing ed. 1981). This guaranty of a jury trial in the Constitution and the common law traditions it reflects "do not admit

the contention that facts are better discovered by judicial inquisition than by adversarial testing before a jury."*Id.* at 313 citing 3 Blackstone, *Commentaries*, at 373-374; 379-381. The summary rulings below denied petitioner her day in court, a due process right.

*2. The Eleventh Amendment And The Doctrine of Judicial Immunity Does Not Justify Dismissal of Petitioner's Complaint.* In *Ashcroft v. Iqbal et al.*, 556 U.S.___(2009) and *Bell v. Atlantic Corp. v. Twombly*, 550 U.S. 544, 555;570(2007), the Court reinterpreted the standards of *Conley v. Gibson*, 355 U.S. 41, 45-46(1957) for dismissing a complaint under Rule 12(b)(6) for failure to state a claim upon which relief may be granted. To survive such a motion now, the complaint's *factual*—not legal---allegations are taken as true; and if the complaint so read contains sufficient factual matter to state a claim for relief that is plausible on its face, allowing the court to draw the reasonable inference that the defendant is liable for the misconduct alleged, dismissal is not warranted. *Iqbal*, 556 U.S. at ___. *Twombly*, 550 U.S. at 556-557;570. In the event a complaint is deemed deficient under this new standard, *Iqbal* suggests allowing the plaintiff the opportunity to amend the complaint to conform to these requirements. *Id.* at ___.

Petitioner's allegations in her complaint do not consist of naked legal conclusions; they contain facts which are inconsistent with legal conduct. Consonant with *Twombly* and *Iqbal*, petitioner has alleged facts in her 57-page complaint which, taken as true, describe illegal conduct by respondents and she has stated a ground for relief that is plausible. Petitioner alleged that the SCJC is the disciplinary agency

constitutionally charged with the responsibility to review and investigate complaints of judicial misconduct in the New York State courts and its administrative agencies and to enforce the obligations of judges to observe high standards of conduct. Furthermore, the SCJC is empowered to make rules so that it can carry out these responsibilities in a meaningful and fair way.

However, as petitioner alleged, § 44(1) of New York's Judiciary Law grants the SCJC unbridled discretion to determine which allegations of a complaint are without merit and to dismiss complaints against judges for any reason or for nor reason at all. It also fails to provide any intelligible principle or standard for the SCJC to ascertain the validity of complaints brought against judicial officials; it fails to provide for an appeal process; and it allows the SCJC to deliberate in secret and engage in capricious, ad hoc decisionmaking. Because § 44(1) of New York's Judiciary Law grants a constitutional obligation to an organization not subject to any review or oversight, petitioner claims that this statute denies her due process and the equal protection of the laws.

Petitioner alleges facts describing the same failings and raising the same constitutional issues with regard to § 90 of the Judiciary Law, the Legislature's open-ended grant of power to the DDC to discipline attorneys. Petitioner seeks to hold accountable the State of New York and its administrative and judicial "arms" for the injuries to her *federal* constitutional rights which they've inflicted upon her by enforcing arbitrary mechanisms for resolving grievances against judges and attorneys. Specifically, she seeks to have

declared unconstitutional §§ 44(1) and 90 of New York's Judiciary Law and to enjoin their enforcement because those statutory remedies provide no transparency, no meaningful review process and deny petitioner due process and equal protection of law in violation of the Fourteenth Amendment.

Enjoining prospectively the operation of §§ 44(1) and 90 of New York's Judiciary Law as repugnant to the federal constitution is not barred by the State's sovereign immunity. Such a remedy against the State and State actors for conduct in contravention of the federal constitution is entirely consistent with our federal structure; and the idea that States, regardless of their sovereignty, can act in derogation of its own citizens' *federal* constitutional rights and avoid prospective injunctive relief from such conduct has been consistently repudiated by this Court. *Quern v. Jordan*, 440 U.S. 332, 337(1979). *Edelman v. Jordan*, 415 U.S. 651, 663(1974). *Ex parte Young*, 209 U.S. 123, 160(1908).

Any other result violates the Supremacy Clause and runs afoul of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177(1803); *McCulloch v. Maryland*, 17 U.S. 316, 436(1819); and *Ex parte Young, supra*. It also ignores the thrust of 42 U.S.C. § 1983, and the distinctly federal remedy it has historically provided citizens harmed by State actors who deprive them of their federal constitutional rights. *Dennis v. Higgins*, 498 U.S. 439, 445(1991). *Mitchum v. Foster*, 407 U.S. 225, 238-239 (1972). Monroe v. Pape, 365 U.S. 167, 180(1961). *United States v. Classic*, 313 U.S. 299, 326 (1941). See *Screws v. United States*, 325 U.S. 91, 107-108(1945).

Nor is judicial immunity a valid defense to petitioner's allegations that some of the judicial respondents engaged in a conspiracy to obstruct justice, to commit perjury and to deprive petitioner of her rights under the Fourteenth Amendment in retaliation for petitioner filing complaints against them for their repeated contempt of the Governor's executive orders, judicial directives and for other malfeasance. Judicial immunity is overcome when suit is brought for acts which are not judicial or adjudicative in nature, *Forrester v. White*, 484 U.S. 219, 229(1988), or when they are carried out in the absence of any jurisdiction to do so. *Mireles v. Waco*, 502 U.S. 9, 11-12(1991), *Stump v. Sparkman*, 435 U.S. 349, 356-357(1978). See *Briscoe v. LaHue*, 460 U.S. 325, 341 n.26(1983).The criminal acts here alleged describe conduct which is non-judicial in character and without any jurisdiction to carry out these actions.

The court of appeals was therefore wrong to rely upon the Eleventh Amendment or the doctrine of judicial immunity to justify the district's court's *sua sponte* dismissal of petitioner's complaint.

*3. The Rooker-Feldman Doctrine Does Not Apply To Petitioner's Allegations.* Under *Rooker v. Fidelity Trust Co.*, 263 U.S. 413(1923), only the Supreme Court, not the lower federal courts, has jurisdiction to review state court decisions. *Id.* at 416. In *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462(1983), this Court further held that federal district courts may not exercise jurisdiction over facially constitutional issues which are "inextricably intertwined" with a state court judgment since this would be tantamount to a federal district court sitting

in direct review of the decisions of the state tribunal. *Id.* at 476;482 n.16. Thus the *Rooker-Feldman* doctrine prohibits federal district courts from adjudicating actions in which the relief requested requires determining that the state's decision is wrong or voiding the state court's ruling.

In a unanimous opinion in *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280(2005), the Court sought to simplify the reach of the *Rooker-Feldman* doctrine and to rein in any expansive views of the doctrine which have led lower federal courts to refuse to hear cases which legitimately invoked their federal jurisdiction.

Speaking through Ginsburg, J., the *Exxon Mobil* Court held that "[t]he *Rooker-Feldman* doctrine...is confined to...cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Id.* at 283-284. *Exxon Mobil* involved parallel state and federal litigation and this Court held that *Rooker-Feldman* is not triggered simply by the entry of a judgment in state court. *Id.* at 292-293. Disposition of the federal claim, once the state-court adjudication is complete, would be governed by regular preclusion law consonant with the Full Faith and Credit Act, 28 U.S.C. § 1738. *Id.*

Where petitioners have already dismissed without prejudice the state-court litigation at the time they seek to invoke federal jurisdiction under 28 U.S.C. § 1332 or § 1343, *or where there is no final state court*

*judgment which a federal court is being asked to review*, the *Exxon Mobil* Court stated that

> [§ ] 1257 [does not ] stop a district court from exercising subject- matter jurisdiction .... If a federal plaintiff "present[s] some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party..., then there is jurisdiction....

*Id.* at 293. See also *Lance v. Dennis*, 546 U.S. 459(2006) *passim*. Moreover, after *Mobil Exxon*, without a *final* state court judgment, *Rooker-Feldman* does not apply in any event. See *Federacion de Maestros de Puerto Rico v. Junta de Relaciones del Trabajo de Puerto Rico*, 410 F.3rd 17, 23-25(1st Cir. 2005)("finality" under *Rooker-Feldman* analyzed).

Given this law, it was an unauthorized expansion of *Exxon Mobil* for the court of appeals to rely on the *Rooker-Feldman* doctrine to affirm the district court's *sua sponte* dismissal of petitioner's complaint. First, petitioner has not "lost" in state court and she is not a "state court loser;" her § 1983 claims have *never* been brought or litigated in state court and this is the first time petitioner has brought these claims against these respondents. Second, petitioner is *not* asking the federal court to review any state-court judgment; her facial constitutional challenge to §§ 44 and 90 of the Judiciary Law under § 1983 is new, has never been adjudicated in any court and remains unaddressed and undecided by any court, state or federal. Third, petitioner's claims are not "inextricably intertwined" with the merits of any state court litigation and does not invoke the facts of any prior state court suit.

Finally, there was no opportunity for petitioner to litigate her claims in state court because the rulings of the SCJC and the DDC under challenge here were unappealable and could not be reviewed in state court in any event. For these reasons, the *Rooker-Feldman* doctrine cannot justify the dismissal of petitioner's complaint.

*4. Petitioner Has Alleged Facts Which Show That Her Federal Rights Under the Constitution Were Violated by The Unfair and Unequal Enforcement of Sections 44 and 90 of the Judiciary Law of New York.* Petitioner's allegations that respondents failed or refused to investigate and decide disciplinary actions she pursued against State court judges and State attorneys, allegedly causing her constitutional injury in the form of a denial of due process and the equal protection of the laws, is the allegation of (a) an "injury in fact,"(b) causally connected to the alleged conduct or inaction of the State actors which (c) will be redressed by a favorable decision, all within the requirements of *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561(1992).

At the very least, even if petitioner's complaint is deemed deficient under this new standard of *Twombly*, petitioner should have been afforded the opportunity to amend her complaint to replead her factual allegations to conform to these new requirements. *Iqbal*, 556 U.S. at ___.

**2. Circuit Judge Wesley Was Bound To Recuse Himself From Hearing This Appeal.**

As the majority in *Hugh M. Caperton et al. v. A.T. Massey Coal Company, Inc. et al.*, 556 U.S. ___; 129 S.Ct. 2252(2009) makes clear, due process requires a neutral and detached judge both at the trial and appellate level. *Hamdi v. Rumsfeld*, 542 U.S. 507, 533(2004) quoting *Ward v. Vill. of Monroeville*, 409 U.S. 57, 61-62 (1972). *Withrow v. Larkin*, 421 U.S. 35, 46-47(1975). *In re Murchison*, 349 U.S. 133, 136 (1955). See *Citizens United v. Federal Election Commn.*, 558 U.S. ___, ___(2010).Trial and appellate judges are more than mere umpires----in fact, they are the governors of the proceedings before them----and they cannot become an advocate or otherwise use their judicial powers to advantage or disadvantage a party. *Quercia v. United States*, 289 U.S. 466, 470(1933). Nor "should [they] give vent to personal spleen or respond to a personal grievance." *Offutt v. United States*, 348 U.S. 11,14(1954). 28 U.S.C. §§ 455(a) and (b)(1) & (b)(5)(iv).

The *Caperton* Court established that the due process clause provides a constitutional floor in analyzing when recusal of a judge is required, i.e., "when the probability of actual bias on the part of the judge or decision-maker is too high to be constitutionally tolerable"----when, that is, there is a "serious, objective risk of actual bias." 556 U.S. at ___;129 S.Ct. at 2257;2265. The objective due process standards do not require proof of actual bias but instead ask whether "under a realistic appraisal of psychological tendencies and human weakness," the interest "poses such a risk of actual bias or prejudgment that the practice must be forbidden if the

guarantee of due process is to be adequately implemented." *Id.* at __;129 S.Ct. at 2263 quoting *Withrow*, 427 U.S. at 47.

Here Judge Wesley was intimately connected with the allegations of judicial misconduct by State judicial actors in this and other cases, having sat in the New York Court of Appeals while some of the relevant events integral to petitioner's complaint were transpiring. He was being asked on this appeal, in effect, to "second guess" decisions of a state court on which he sat.

Moreover, one respondent in this case, Hon. Judith S. Kaye, Chief Judge of the New York Court of Appeals, named in both her official and individual capacities, is alleged to have negligently supervised certain judges and negligently supervised certain attorneys of the DDC in her other duties as Chief Administrator of the Court. Respondent Judge Kaye was appointed to the New York Court of Appeals in 1983. Judge Wesley, after being appointed to the Appellate Division of the Supreme Court, Fourth Department, in 1994, became a Judge on the Court of Appeals in 1997 and sat with Judge Kaye on that court for six years.

Both Judge Wesley and Judge Kaye were on the Court of Appeals when petitioner was seeking to have Judge Kaye exercise her supervisory powers over the conduct of certain judges and DDC attorneys, as alleged in her complaint. As such, Judge Wesley had knowledge of Judge Kaye's daily activities and how much time she devoted to either deciding cases or supervising in her administrative role the judges and

attorneys at DDC. Thus Judge Wesley may be a material witness in this case and should have recused himself from hearing petitioner's appeal pursuant to 28 U.S.C. § 455(b)(5)(iv).

Furthermore, his outburst from the Bench during oral argument in this case, remarks which denigrated petitioner and her appeal in open court and exposed the prejudgment and bias he brought to this matter, warranted his recusal under *Caperton's* analysis as a matter of law. His failure to do so fatally contaminated the decisionmaking process of the court of appeals and itself warrants a remand for a rehearing of petitioner's appeal by a different panel as a matter of due process.

## CONCLUSION

For all the reasons identified herein, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Second Circuit and, ultimately, to vacate and reverse the *sua sponte* dismissal of petitioner's complaint and remand the matter to the United States District Court for the Southern District of New York for further proceedings including discovery and trial, or provide petitioner with such other relief as is fair and just in the circumstances of this case.

Respectfully submitted,

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(212)509-7700

(any footnotes trail end of each document)

No. 08-4719-cv

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ELEANOR CAPOGROSSO, Plaintiff-Appellant,

v.

NEW YORK STATE COMMISSION ON JUDICIAL CONDUCT, STATE OF NEW YORK, OFFICE OF COURT ADMINISTRATION, HON. FERN FISHER BRANDVEEN, IN HER OFFICIAL AND INDIVIDUAL CAPACITIES, HON. EILEEN BRANSTEN, IN HER OFFICIAL AND INDIVIDUAL CAPACITIES, HON. JOHN T. BUCKLEY, IN BOTH HIS OFFICIAL AND INDIVIDUAL CAPACITIES, HON. JOAN CAREY, IN HER OFFICIAL AND INDIVIDUAL CAPACITIES, SHERRY K. COHEN, IN HER OFFICIAL AND INDIVIDUAL CAPACITIES, PAUL CURRAN, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES, HON. CAROL R. EDMEAD, IN HER OFFICIAL AND INDIVIDUAL CAPACITIES, RAOUL FELDER, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES, HON. JUDITH GISCHE, IN HER OFFICIAL AND INDIVIDUAL CAPACITIES, SARAH JO HAMILTON, IN HER OFFICIAL AND INDIVIDUAL CAPACITIES, HON. DEBRA JAMES, IN HER OFFICIAL AND INDIVIDUAL CAPACITIES, HON. JUDITH S. KAYE, IN HER OFFICIAL AND INDIVIDUAL CAPACITIES, HON. JOAN M. KENNEY, IN HER OFFICIAL AND INDIVIDUAL CAPACITIES, CATHERINE O'HAGAN WOLFE, IN HER OFFICIAL AND INDIVIDUAL CAPACITIES, HON. K. JEFFREY

OING, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES, HON. EILEEN A. RAKOWER, IN HER OFFICIAL AND INDIVIDUAL CAPACITIES, SHERILL SPATZ, IN HER OFFICIAL AND INDIVIDUAL CAPACITIES, HON. MARTIN A. SHULMAN, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES, HON. GEOFFREY D. WRIGHT, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES, JOHN DOE 1-20, JANE DOE 1-20, THE APPELLATE DIVISION, FIRST DEPARTMENT, DEPARTMENTAL DISCIPLINARY COMMITTEE, THOMAS J. CAHILL, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES, Defendants-Appellees.

October 30, 2009, Decided

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

COUNSEL: For Plaintiff-Appellant: PAUL E. KERSON, Leavitt, Kerson & Duane, New York, N.Y. For Defendants-Appellees: PATRICK J. WALSH, Assistant Solicitor General (Michael S. Belohlavek, Senior Counsel, on the brief), for Barbara D. Underwood, Solicitor General, Andrew M. Cuomo, Attorney General of the State of New York, New York, N.Y.

Present: JOHN M. WALKER, JR., GUIDO CALABRESI, RICHARD C. WESLEY, Circuit Judges.

SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the opinion and order of the district court be AFFIRMED.

Plaintiff-Appellant Eleanor Capogrosso appeals from an August 8, 2008 opinion and order of the United States District Court for the Southern District of New York (Scheindlin, *J.*) dismissing her claims sua sponte, and an August 28, 2008 order of that same court denying reconsideration of her claims.

The Eleventh Amendment to the United States Constitution bars Appellant's claims against the State of New York and its arms. Moreover, the defendant New York State judges are afforded absolute judicial immunity, as are those remaining defendants "who perform functions closely associated with the judicial process." *Oliva v. Heller*, 839 F.2d 37, 39 (2d Cir. 1988).

To the extent that Appellant is effectively asking the Court to review decisions of the courts of the State of New York, we lack jurisdiction to address her claims. *See Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 283-88, 125 S. Ct. 1517, 161 L. Ed. 2d 454 (2005) (explaining the *Rooker-Feldman* doctrine). With respect to her remaining claims, Appellant fails to allege a deprivation of "a right, privilege, or immunity secured by the Constitution or laws of the United States." *Charles W. v. Maul*, 214 F.3d 350, 357 (2d Cir. 2000).

Accordingly, the opinion and order of the district court dismissing Appellant's action is hereby AFFIRMED. Any outstanding motions are hereby DENIED as moot.

07 Civ. 11612 (SAS),08 Civ. 2391 (SAS),08 Civ. 3305 (SAS),08 Civ. 4438 (SAS),08 Civ. 5455 (SAS),08 Civ. 6368 (SAS)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

LUISA C. ESPOSITO,
Plaintiff,
- against –
STATE OF NEW YORK, et al.,
Defendants.

KEVIN MCKEOWN,
Plaintiff,
- against –
STATE OF NEW YORK, et al.,
Defendants.

PAMELA CARVEL,
Plaintiff,
-.against –
-NEW YORK STATE, et al.,
Defendants.

SUZANNE MCCORMICK, Plaintiff,
- against –
STATE OF NEW YORK, et al.,
Defendants.

ELEANOR CAPOGROSSO,
Plaintiff,
- against –
THE NEW YORK STATE COMMISSION ON JUDICIAL CONDUCT, et al.,

Defendants.

JOHN L. PETREC-TOLINO,
Plaintiff,
- against -
THE STATE OF NEW YORK, et al.,
Defendants.

August 8, 2008, Decided
August 8, 2008, Filed

ORDER AND OPINION

SHIRA A. SCHEINDLIN, U.S.D.J.:

## I. INTRODUCTION

These actions, all filed as related to *Anderson v. State of New York*, [1] relate to alleged corruption in the New York State courts. Each action alleges some underlying wrongdoing by an attorney, followed by a complaint to the disciplinary committee, followed by the committee's failure to take action. The Complaints generally allege that the disciplinary committee is engaged in a conspiracy to "whitewash" grievances filed against prominent attorneys.

As discussed below, the United States Constitution does not permit this Court to supervise the departmental disciplinary committees or review the decisions of the courts of New York State. Regardless of the possibility of corruption in the courts of the State of New York, the only federal court that may review their decisions is the United States Supreme Court. Plaintiffs must direct their complaints to the state court system, the Attorney General for the State of New

York, or the appropriate United States Attorney. Because the Court lacks jurisdiction to review the decisions of the departmental disciplinary committees, and for the other reasons stated below, these actions are dismissed.

## II. BACKGROUND

### A. Esposito v. State of New York

In this action, Luisa Esposito alleges that her former attorney repeatedly sexually harassed and assaulted her. She also alleges that the New York City Police Department failed to pursue her criminal complaint against him and that the New York state court system failed to pursue her attorney grievance.

#### 1. Facts [2]

Esposito engaged the law firm of Pollack, Pollack, Isaac & DeCicco to represent her in a lawsuit resulting from a car accident. In May or June of 2005, that firm forwarded the relevant files to Gladstein & Isaac. On July 8, 2005, Esposito went to the offices of Gladstein & Isaac to meet with one of the attorneys for trial preparation. [3] During this meeting, without cause or provocation, that attorney grabbed Esposito's left breast. After the meeting, that attorney told Esposito that if she were to tell anyone what happened, he would no longer represent her.

The attorney then began a campaign of harassment. He repeatedly telephoned Esposito, asked her to compile a list of sex acts that she could no longer perform as a result of the accident, demanded details of her personal life, and requested that she send him provocative photos. [4] Esposito recorded a number of these

conversations. On another occasion, the attorney demanded that Esposito try on clothing in front of him, grabbed her breasts, and told her that he would not represent her unless she performed oral sex on him. [5] Faith Wyckoff witnessed a portion of this episode.

In October or November of 2005, Esposito contacted the New York County District Attorney and met with ADA Jennifer Steiner Crowell, who interviewed Esposito and had her sign medical releases. Crowell told Esposito she would pursue charges of extortion, coercion, and sexual abuse against the attorney. [6] However, Crowell stopped returning Esposito's calls.

On December 23, 2005, Esposito called the Rape Crisis Hotline and was sent to meet with Detective Arbuiso of the Manhattan Special Victims Unit. Arbuiso questioned Esposito and Wyckoff about the assault and then told them that he would arrest the attorney. [7] However, some time later, Arbuiso told Esposito that he "want[ed] to make the arrest" but because "favors" were called in, he was unable to do so. [8] He also explained that "it was ADA Lisa Friel that wasn't allowing the arrest." [9] She also met with Lieutenant Adam I. Lamboy, but he refused to accept her affidavit. [10]

In February of 2006, Esposito was called to meet with Crowell and Friel. She had brought an attorney, but the attorney was not permitted in the room. [11] Friel told her that the attorney's version of the story was more credible. The D.A.'s office closed the investigation. [12] Esposito also hired an attorney, Anthony Denaro, who sent a letter to Police Commissioner Raymond Kelly asking that the attorney be arrested. [13] Appellate Division, First Department, Departmental Disciplinary

Committee ("DDC") against the attorney. The grievance was handled by Naomi Goldstein, an attorney with the DDC. From 2006 through 2007, Goldstein conducted telephone interviews of Esposito. The DDC began hearings in April of 2007. [14] The Hon. Albert S. Blinder was the referee on the complaint. At the hearings, the DDC [*6] produced transcripts of Esposito's recordings that were inaccurate and refused to return the original tapes to Esposito. [15] It also refused to allow her attorney to attend the proceedings. On May 1, 2007, Esposito wrote numerous letters to various judges of the New York State Courts. [16] Esposito also complained to Thomas J. Cahill, Chief Counsel for the DDC. [17]

**2. Claims**

Pursuant to section 1983, Esposito claims that all defendants violated her rights to due process and equal protection, as well as her First Amendment right to petition the government for redress of grievances. She also claims that the City of New York, Kelly, Arbuiso, and Lamboy violated her rights to due process and equal protection. Finally, she pleads state law breach of contract, breach of fiduciary duty, and assault claims against the attorney; Harvey Gladstein & Partners LLC; and Pollack, Pollack, Isaac & DeCicco LLP.

**B. McKeown v. State of New York**

This action also involves a claim that an attorney's conduct was unethical and that the New York State court system refused to investigate.

**1. Facts** [18]

On September 2, 2003, Kevin McKeown and his sister Mary Virga engaged the legal services of Joseph F. McQuade in connection with probate proceedings of their mother's estate. [19] At the time of her death, their mother had four living children, one of which, Ronald McKeown ("Ronald"), had been arrested for stealing over $ 100,000 from the Red Cross and had several large outstanding judgments for stolen money. [20] McKeown believed that his mother wanted her estate to repay the Red Cross, and informed McQuade of this fact, but his sister and McQuade took steps to prevent this. [21] McQuade then appeared in a conference in front of Joseph M. Accetta of the Office of Court Administration (the "OCA") in which he filed an order to show cause against McKeown. [22] McKeown alleges that Accetta and Robert M. DiBella, also an attorney at the OCA, and Judge Anthony A. Scarpino "failed their duty as an [sic] attorneys and as OCA employees when they chose not to report or take any action against McQuade's breaches of the most fundamental attorney-client obligations." [23]

Some time later, Ronald committed suicide. Shortly thereafter, Frank W. Streng, Ronald's attorney, filed an assignment of interest. Accetta; DiBella; Robert A. Konen, apparently an attorney involved in the case; McQuade; Michael McQuade ("M. McQuade"), partner of McQuade; and Judge Scarpino knew that Streng no longer had authority to file such a document, but "improperly remained silent and took no corrective action." [24] Charles and Christine Giulini, attorneys who were involved in the case, acted in reliance on the assignment knowing it to be improper. [25]

In early 2004, Charles Giulini told McKeown, "[i]f you don't simply forget about the fucking assignment, and

just stop bringing it up, you'll be fucking destroyed. You have no idea what the fuck you're up against." [26] Indeed, the Giulinis, Scarpino, McQuade, M. McQuade, Korren, DiBella, and Accetta "retaliated against plaintiff for raising the issue of the appearance of impropriety . . . ." [27]

On May 17, 2006, plaintiff filed an ethics complaint with the DDC against McQuade. On May 15, 2007, the DDC informed McKeown that the grievance had been resolved by the Surrogate and the DDC would take no further action. [28] Nancy J. Barry, Principal Attorney at the OCA, then sent a letter to the DDC that "was intended to improperly influence the DDC by conveying, displaying and expressing a heightened level of interest by defendants . . . in plaintiff's ethics complaint against defendant McQuade." [29]

In January of 2008, McKeown met with Sherry K. Cohen, a supervising attorney at the DDC, who stated that she was in charge of the grievance and that it had been resolved. [30] McKeown contacted Cahill for more information, but Cahill was unable to tell him anything more. [31]

McKeown filed "numerous" grievances with the Second Department's Ninth Judicial District Grievance Committee. He alleges that these were "summarily ignored," though he also alleges that as a result of the grievances, certain attorneys were admonished. [32] The Grievance Committee also transferred one of the complaints to an attorney bar association, though Gary L. Casella and Catherine M. Miklitsch, attorneys employed by the committee, knew that this was improper. [33] Further, Francis A. Nicolai, attorney and judicial administrator for the Ninth Judicial District,

allegedly improperly protected Streng and refused to recuse himself. [34]

Judge Gail Prudenti of the Appellate Division, Second Department sent the allegations to the Commission on Judicial Conduct, which declined to take action. [35] McKeown alleges that this Commission is "a partial arbiter of secreted agendas that provides a grossly improper disservice to plaintiff, the general public, the legal community, the system of law and, in fact, the vast majority of honorable justices of the state's courts." [36] He contends that the DDCs and the Commission "are improperly beholden to political and legal outsiders [and] advance or thwart selective ethics inquiries without regard to merit." [37]

### 2. Claims

McKeown alleges that all defendants violated his rights to petition the government for redress of grievances, to equal protection, and to due process pursuant to the First and Fourteenth Amendments. These claims are brought under section 1983. He also alleges state law breach of contract and breach of fiduciary duty claims against the McQuades and their law firm.

## C. Carvel v. New York State

In this action, Pamela Carvel, the daughter of ice cream magnate Tom Carvel, alleges that certain of Tom Carvel's employees conspired with the attorneys and judges that were involved in the administration of his estate. The result of this conspiracy was the theft of hundreds of millions of dollars from Tom Carvel's rightful heirs and charitable institutions. [38]

### 1. Facts [39]

Thomas Andreas Carvel as ("Tom Carvel"), founder of the Carvel Corporation, was born in Athanassos, Greece in 1906. His family came to the United States in 1910 and settled in New York City in 1920. [40] Advised to leave the City to treat his tuberculosis, he borrowed money from his future wife, Agnes, built a frozen custard trailer, and set out to Westchester County, New York. A flat tire led to the selection of a permanent location, and by 1939 his business had become well-established. With Agnes's assistance, Tom Carvel ran the business for decades, building it into a national franchise and household name. In 1989, one year before his death, he sold the business to Investcorp. [41]

On Saturday, October 20, 1990, Tom revealed that he was firing his secretary, Mildred Arcadipane, and his lawyer, Robert Davis, and that he and his niece, plaintiff Pamela Carvel, were to commence an investigation into collusion between his employees and attorneys employed by Investcorp. [42] The next day, Tom was found dead. [43] William Griffin, an attorney and Chairman of Hudson Valley Bank, was colluding with Arcadipane and Davis to take control of the Carvel estate. [44] Most of the estate's records were transferred to Hudson Valley Bank, where they were altered, forged, or destroyed. [45] On August 4, 1998, Agnes Carvel died from a stroke. [46]

Pamela Carvel hired Blank Rome to represent the estate, which was assigned to the Hon. Anthony Scarpino. Blank Rome attorney Eve Markewich entered into a secret agreement with Griffin's attorneys pursuant to which Markewich would receive between three and four million in legal fees as long as she prevented Pamela Carvel and Agnes Carvel's

estate from obtaining any money from Tom Carvel's estate. [47] A number of individuals knew of this behavior and failed to report it. [48] Markewich and Leonard Ross, apparently an associate of Markewich, also colluded to steal securities that belonged to Pamela Carvel. [49]

Pamela Carvel then hired Streng, McCarthy, and Aurnou, attorneys from the law firm of McCarthy Fingar. Streng failed to disclose that he was employed by the court system as "Scarpino's advisor in a 'transition committee' from Supreme Court to Surrogate's Court.'" [50] These attorneys "did nothing to oppose Markewich's breach of promise to seek timely reimbursement to Pamela that was the condition of Blank Rome's employment. [51] Instead, they aided Griffin, Judge Scarpino, and Charles Scott, an attorney employed by OCA. [52] Aurnou had apparently been retained separately and later joined McCarthy Fingar. [53]

Unbeknownst to Pamela Carvel, Scarpino had received several hundred thousand dollars in loans from Hudson Valley Bank, which was controlled by Griffin. [54] Days before a response was due opposing certain fee applications, Streng withdrew as counsel and refused to return a cash advance. [55]

Pamela Carvel also contends that Griffin wrongfully sold Agnes Carvel's former residence to the brother of attorney Paul Amicucci, a member of Griffin's law firm and member of the Hudson Valley Bank Business Development Board. She alleges that the purchase price was a small fraction of its fair market value. [56]

Pamela Carvel also alleges that Markewich colluded with Griffin, Streng, McCarthy, Aurnou, Scarpino, and Scott to prevent Certified Public Accountant Anthony

Vasile from receiving payment for services he performed for the estate. [57] Vasile was hired to investigate improper money transfers in the years following Tom Carvel's death. [58]

On August 30, 2005, Pamela Carvel filed a complaint with the DDC against Markewich and filed a separate complaint with the grievance committee against Streng. [59] Both complaints were dismissed on the ground that they were the subjects of litigation. [60] By letter to Cahill, on July 19, 2006, Pamela Carvel requested that the DDC reconsider its decision. She believes her complaint was dismissed by Cohen and Cahill "because of Markewich and Blank Rome's influential connections." [61]

The New York State Attorney General's Office also became involved in the conspiracy. Assistant Attorney General Laura Werner entered into agreements with Griffin and the other conspirators. As a result, Werner took positions during the estate litigation that opposed those of Pamela Carvel. [62] Pamela Carvel also alleges that Werner failed to maintain proper records of the various charities controlled by Thomas and Agnes Carvel. [63] Deborah McCarthy, a former attorney at McCarthy Fingar who joined the Attorney General's Charities Bureau, was also involved in the conspiracy. [64] McCarthy falsified documents to assist McCarthy Fingar in billing over $ 700,000 in legal services to the estate. [65]

## 2. Claims

Pursuant to section 1983, Pamela Carvel alleges that all defendants engaged in a conspiracy to deny her rights to due process and equal protection. She further alleges

that all defendants violated her rights to free speech and to petition the government for redress of grievances. Her remaining claims are state law claims.

### D. McCormick v. State of New York

#### 1. Facts [66]

Unlike the other plaintiffs, Suzanne McCormick has provided minimal information as to her underlying dispute. She hired Winthrop Rutherford, Jr. and David G. Keyko to represent her in connection with the estate of her late husband. [67] Rutherford and Keyko altered court records and committed other acts of misconduct, culminating in a multi-million dollar fraud. [68]

In 2005, McCormick filed a complaint with the DDC and provided "confirming evidence" of the fraud perpetrated by Rutherford and Keyko. [69] Despite knowledge of Rutherford's and Keyko's fraudulent activity, the DDC "completely failed their individual and collective ethical duties as attorneys at law when they chose not to report or take any action concerning the [fraud]." [70]

#### 2. Claims

Pursuant to section 1983, McCormick claims that all defendants violated her rights to due process and equal protection, as well as her right to petition the government for redress of grievances. She also alleges state law breach of contract against all defendants and that "every defendant [breached] her basic constitutionally guaranteed right of fiduciary duties of good faith, loyalty, and care." [71]

## E. Capogrosso v. New York State Commission on Judicial Conduct

Plaintiff Eleanor Capogrosso, an attorney admitted to practice in New York, has brought an action that comprises what appear to be a series of unrelated disputes. These are described separately. [72]

### 1. The Default Judgment

Capogrosso hired Gentile & Benjamin to defend her in a fee dispute action brought by attorney Gregory Calabro. [73] A default was awarded against her. She asked attorney Howard Benjamin to move to vacate the default, but he refused, promising instead to pay the judgment. He failed to provide her with evidence that he did so. [74] As a result, the default remained on her credit record, causing her various financial problems.

In 2001, Capogrosso filed a grievance with the First Department DDC against Calabro and Benjamin for failing to maintain bank records for the requisite period of time. Sarah Jo Hamilton, First Deputy Chief Counsel for the DDC, had the action moved to the Fourth Department DDC, which closed the action. [75]

Capogrosso then sued Calabro under the Fair Credit Reporting Act. The action was assigned to defendant the Hon. Joan M. Kenney. Capogrosso also filed a new grievance against Benjamin. Cahill referred the grievance to mediation. Capogrosso filed an action for judicial review of the DDC's dismissal of her grievance with the Appellate Division, but that court declined to exercise jurisdiction. [76] Judge Kenney dismissed the action, and based on that decision the DDC canceled the

mediation. [77] Capogrosso alleges that Judge Kenney's decision contains false statements. [78]

Capogrosso's office was located near the World Trade Center, and the events of September 11, 2001 disrupted her ability to work. Following those events, then-Governor Pataki issued a series of executive orders that permitted courts to extend any time limits fixed by statute for directly affected persons. Capogrosso "had left the country since her office was not functioning?" [79]

In what was apparently a separate action filed by Capogrosso against Benjamin, assigned to the Hon. Carol R. Edmead, Benjamin moved to dismiss, and Edmead refused to grant Capogrosso an adjournment even though she was not in the country. Instead, he granted Benjamin's motion to dismiss by default. [80] Capogrosso moved to vacate the default, and her motion was assigned to the Hon. Jeffrey K. Oing, who upheld the default. [81] She filed a motion to reargue this decision, and it was denied by the Hon. Geoffrey D. Wright. [82] Capogrosso then filed an order to show cause regarding Judge Wright's decision with the Hon. Martin A. Shulman, who did not take appropriate action. [83] Capogrosso then notified the Hon. Fern Fisher Brandveen and the Hon. Joan B. Carey, who also failed to take appropriate action. [84] Capogrosso notified Carrie Cohen, Chief of the Public Integrity Unit of the Office of the Attorney General, and copied Sherill Spatz, Inspector General, but they took no action. [85]

Capogrosso sent more supporting documentation to the DDC. The DDC attempted to resolve the issue by obtaining bank copies of the checks used by Benjamin to pay the judgment, to assist in removing the debt

from her credit report. She did not obtain these checks. Capogrosso sent a number of letters to Chief Judge Judith Kaye concerning the DDC's refusal to pursue the grievance and other matters, but these letters were ignored.

On November 8, 2004, Cahill informed Capogrosso that the DDC had completed the investigation and would take no action against Benjamin. [86] She appealed to Paul Curran, Chairman of the DDC, but he denied reconsideration. She then wrote letters to Chief Judge Kaye and to Judge John Buckley, but these went unanswered.

**2. Failure to Adjourn a Conference**

On October 10, 2001, Capogrosso appeared before defendant the Hon. Eileen Rakower in connection with an action she had filed against the Hospital for Special Surgery. She had been awarded a default, but the hospital had moved to open the default and be permitted to file an answer. Capogrosso requested an adjournment to oppose the motion because of the state of her office. [87] Judge Rakower denied the adjournment request and granted the motion. [88]

**3. Legal Malpractice**

Capogrosso sued a former attorney for malpractice. [89] Defendant the Hon. Debra James dismissed this action. [90]

**4. Alleged Animus**

Capogrosso alleges that defendant the Hon. Judith Gische presided over a case that Capogrosso filed and that she "screamed at counsel, 'Do you know how many

frivolous cases she has? Don't you know that she is a professional litigant?'" [91] As a result of Judge Gische's animus, Capogrosso had to settle the case rather than go to trial, allegedly depriving Capogrosso of her right to due process. [92]

**5. Denial of Counsel**

In an apparently unrelated action also brought by Capogrosso, the defendant Hon. Eileen Bransten granted a motion for Capogrosso's counsel to withdraw, apparently on the ground that Judge Bransten and the attorney were friends. [93] Judge Bransten then ordered Capogrosso to appear for a deposition without counsel; when Capogrosso refused, Judge Bransten caused Capogrosso to bear the $ 108 court reporter fee and then dismissed Capogrosso's complaint. [94]

**6. Claims**

Pursuant to section 1983, Capogrosso alleges that Hamilton, Cohen, Cahill, Curran, Chief Judge Kaye, and Judge Buckley engaged in a conspiracy to violate her due process rights. She also alleges that they engaged in obstruction of justice, conspiracy to obstruct justice, and deprivation of property. She asserts that the DDC, Cahill, Judge Buckley, Curran, Chief Judge Kaye, the State of New York, and the OCA are liable for negligent supervision. Pursuant to section 1983, she alleges that Chief Judge Kaye; Spatz; the OCA; the State Commission on Judicial Conduct (the "SCJC"), the State of New York; Raoul Felder, Chair of the SCJC; Carey; and Judges Brandveen, Bransten, Gische, Shulman, Wright, Oing, Rakower, and Edmead engaged in a conspiracy "to hinder public and legal

justice in the State of New York . . . all in retaliation because plaintiff filed complaints and letters about the defendants repeated contempt of Executive orders and Directives." [95] She further alleges that Judge Kenney made false public statements, specifically, that a certain lawsuit "appears to be the 35th lawsuit plaintiff has brought in this court, on her own behalf, as a pro se litigant, since 1998." [96] She also alleges that Judge James made false public statements and deprived her of property and that Judges Bransten and Gische deprived her of her due process rights by failing to adjudicate her state court actions fairly. Capogrosso next alleges that Chief Judge Kaye; Judges Rakower, Edmead, Oing, Wright, Bransten, Gische, Kenney, James, and Shulman; the SCJC; and the State of New York engaged in a separate conspiracy to obstruct justice and that Spatz; the OCA; the State of New York; Judges Shulman, Brandveen, and Carey; and Chief Judge Kaye are responsible for negligent supervision. She further pleads a separate negligent supervision claim against Felder and the SCJC.

Capogrosso's final cause of action concerns section 44 of the New York Judiciary Law. Section 44 provides in relevant part that the SCJC, upon receiving a complaint as to the conduct of a judge, may dismiss the complaint "if it determines that the **[*25]** complaint on its face lacks merit." [97] Capogrosso asserts that by permitting an organization "that is not subject to review or oversight" to review these complaints, the law denies (presumably the complainants) due process and equal protection.

**F. Petrec-Tolino v. State of New York**

John Petrec-Tolino also asserts that the DDC failed to address a grievance. His Complaint provides little information about the underlying dispute.

## A. Facts[98]

Petrec-Tolino's spouse, Sherri Petrec-Tolino, has a history of mental illness. [99] During their engagement, they hired attorney Jeffrey S. Eisenberg to draft a document granting Petrec-Tolino power of attorney. Apparently the relationship soured; in 2004, Petrec-Tolino filed a grievance against Eisenberg with the DDC. [100]

On September 11, 2006, Petrec-Tolino filed an action in small claims court against Eisenberg for breach of contract. Eisenberg responded with a motion to dismiss that included a fraudulent contract and falsely alleged that Petrec-Tolino made threats to his safety. [101] Judge Cindy Kern ruled against Petrec-Tolino on his claims and denied Eisenberg's counterclaims. "Plaintiff failed to file a timely 'Notice of Appeal' due to mercury and arsenic poisoning." [102]

Petrec-Tolino then filed a grievance with the DDC regarding the fraudulent contract. On December 1, 2006, Cahill closed the file, marking it as a fee dispute. [103] Petrec-Tolino also notified the United States Postal Inspector, who forwarded the complaint to the Attorney General for the State of New York. Petrec-Tolino also complained to Attorney General Eliot Spitzer.

On June 1, 2007, the DDC agreed to reconsider Petrec-Tolino's grievance. Eisenberg sent a defamatory and fraudulent response. [104] On December 28, 2007, Cohen closed the file. [105] Petrec-Tolino requested further

reconsideration, but Alan W. Friedberg, also a DDC administrator, denied this request. [106]

### B. Claims

Petrec-Tolino alleges that the DDC, Cahill, Cohen, Friedberg, and Rebecca Taub, an administrator at the DDC, [107] are liable pursuant to section 1983 for denying his rights to due process and equal protection, as well as his right to petition the government for redress of grievances. He also alleges that all defendants violated the Racketeer Influenced and Corrupt Organizations Act ("RICO") in that they "all acted in concert to conspire and roadblock Plaintiff's due process and equal protection under the law." [108] Petrec-Tolino also alleges that Eisenberg is liable for witness tampering, "making an apparently false statement in the first degree," [109] defamation, breach of fiduciary duties, and other state law violations.

## III. APPLICABLE LAW

### A. Standard of Review

"Federal Rule of Civil Procedure 8(a)(2) requires . . . 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" [110] When deciding a defendant's motion to dismiss under Rule 12(b)(6), courts must "accept as true all of the factual allegations contained in the complaint" [111] and "draw all reasonable inferences in plaintiff's favor." [112] Likewise, when deciding a motion for judgment on the pleadings, a court "must accept all allegations in the complaint as true and draw all inferences in the non-moving party's favor." [113]

Nevertheless, to survive a Rule 12(b)(6) motion to dismiss, the allegations in the complaint must meet the standard of "plausibility." [114] Although the complaint need not provide "detailed factual allegations," [115] it must "amplify a claim with some factual allegations . . . to render the claim *plausible*." [116] The test is no longer whether there is "'no set of facts [that plaintiff could prove] which would entitle him to relief.'" [117] Rather, the complaint must provide "the grounds upon which [the plaintiff's] claim rests through factual allegations sufficient 'to raise a right to relief above the speculative level.'" [118]

Although this Court must take the plaintiff's allegations as true, "the claim may still fail as a matter of law . . . if the claim is not legally feasible." [119] In addition, "bald assertions and conclusions of law will not suffice." [120]

Courts must construe pro se complaints liberally. [121] However, a litigant's pro se status does not exempt him from compliance with the relevant rules of procedural and substantive law. [122]

**B. Rule 8(a)**

"[T]he principal function of pleadings under the Federal Rules is to give the adverse party fair notice of the claim asserted so as to enable him to answer and prepare for trial." [123] "The statement should be short because '[u]nnecessary prolixity in a pleading places an unjustified burden on the court and the party who must respond to it because they are forced to select the relevant material from a mass of verbiage.'" [124]

If a pleading fails to comply with Rule 8(a), the court may strike redundant or immaterial portions or, if "the complaint is so confused, ambiguous, vague, or

otherwise unintelligible that its true substance, if any, is well [*31] disguised," dismiss the complaint entirely. [125] It is generally an abuse of discretion to deny leave to amend when a complaint is dismissed for this reason. [126]

### C. Section 1983

Section 1983 "does not create a federal right or benefit; it simply provides a mechanism for enforcing a right or benefit established elsewhere." [127] In order to state a claim under section 1983, a plaintiff must show that the conduct complained of was committed by a person or entity acting under color of state law, and that the conduct deprived a person of rights, privileges, or immunities secured by the Constitution. [128]

### D. Racketeer Influenced and Corrupt Organizations ("RICO")

A plaintiff claiming a civil RICO violation must allege each of the claim's elements, including "(1) conduct, (2) of an enterprise, (3) through a pattern (4) of racketeering activity." [129] In considering civil RICO claims, a court must be mindful of the devastating effect such claims may have on defendants. [130] Civil RICO should not be used to transform a "garden variety fraud or breach of contract case[] . . . into a vehicle for treble damages." [131] The statute of limitations for civil RICO claims is four years. [132]

### E. The Right to an Investigation

"[T]he Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not

deprive the individual." [133] "[C]ourts within the Second Circuit have determined that '[t]here is . . . no constitutional right to an investigation by government officials.'" [134] Thus, there is no constitutional violation where the government refuses to investigate a crime, allegations of patent fraud, or an attorney ethics grievance. [135]

F. Immunity

**1. The Eleventh Amendment**

The Eleventh Amendment to the United States Constitution provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Because the States have sovereign immunity against claims in federal court, a private citizen cannot sue a State unless the State has consented or Congress has abrogated that immunity. [136] "This jurisdictional bar also immunizes a state entity that is an 'arm of the State,' including, in appropriate circumstances, a state official acting in his or her official capacity." [137]

However, under the rule of *Ex parte Young*, [138] "'a plaintiff may sue a state official acting in his official capacity -- notwithstanding the Eleventh Amendment -- for prospective, injunctive relief from violations of federal law.'" [139] This relief requires that there be an ongoing violation of federal law. [140]

"Although the Supreme Court has not specifically ruled on this burden question, circuit courts that have done so have unanimously concluded that 'the entity

asserting Eleventh Amendment immunity has the burden to show that it is entitled to immunity.'" [141] To determine whether a state agency is entitled to immunity under the Eleventh Amendment, the Second Circuit has prescribed six factors: "'(1) how the entity is referred to in the documents that created it; (2) how the governing members of the entity are appointed; (3) how the entity is funded; (4) whether the entity's function is traditionally one of local or state government; (5) whether the state has a veto power over the entity's actions; and (6) whether the entity's obligations are binding upon the state.'" [142] If these are not dispositive, "a court focuses on the twin reasons for the Eleventh Amendment: (1) protecting the dignity of the state, and (2) preserving the state treasury." [143] "If the outcome still remains in doubt, then whether a judgment against the governmental entity would be paid out of the state treasury generally determines the application of Eleventh Amendment immunity." [144]

**2. Judicial Immunity**

Judges have absolute immunity from suits for acts performed in their judicial capacities. Even if a judge acts maliciously, a litigant's remedy is to appeal, not to sue the judge. Judicial immunity can be overcome only where a judge completely lacks jurisdiction over the subject matter. This immunity also extends to the institution of the court itself, as well as its supporting offices.

It is "well-established that officials acting in a judicial capacity are entitled to absolute immunity against § 1983 actions, and this immunity acts as a complete shield to claims for money damages." [145] "Absolute immunity extends not only to judges and prosecutors,

but also to officials who perform functions closely associated with the judicial process, including parole board officials conducting parole hearings, federal hearing examiners, administrative law judges, and law clerks." [146]

Judicial immunity was created "for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences." [147] "Thus, if the relevant action is judicial in nature, the judge is immune so long as it was not taken in the complete absence of jurisdiction." [148] Quasi-judicial immunity protects administrative officers who act in a judicial manner. [149] Attorney disciplinary proceedings are "judicial in nature," [150] so the presiding officers are protected by absolute immunity. However, neither judicial immunity nor quasi-judicial immunity bars a claim for prospective injunctive relief. [151]

### 3. Qualified Immunity

The doctrine of qualified immunity protects government officials from civil liability if the officials' conduct "'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" [152] Qualified immunity balances 'the need . . . to hold responsible public officials exercising their power in a wholly unjustified manner and . . . [the need] to shield officials responsibly attempting to perform their public duties in good faith from having to explain their actions to the satisfaction of a jury.'" [153] Qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." [154] Qualified immunity is "a defense afforded only to individuals -- not

municipalities or municipal agencies." [155] "[A]n official sued in his official capacity may not take advantage of a qualified immunity defense." [156]

There are three steps in a qualified immunity analysis. The court first must determine whether, "taken in the light most favorable to the party asserting the injury . . . the officer's conduct violated a constitutional right . . . ." [157] If there is no constitutional violation, the defendant is not liable and the court need not proceed further. If, however, the plaintiff proves a constitutional violation, the court moves to the second step, which asks whether or not, at the time of the violation, the law prohibiting the defendant's conduct was clearly established. [158] If the violated right was not clearly established, the officer is immunized from liability. "Clearly established" means: "(1) the law is defined with reasonable clarity, (2) the Supreme Court or Second Circuit has recognized the right, and (3) 'a reasonable defendant [would] have understood from the existing law that [his] conduct was unlawful.'" [159] If the law prohibiting defendant's conduct was clearly established, the court moves to the final step in the analysis, which asks whether or not "'it was objectively reasonable for [the defendant] to believe that his actions were lawful at the time of the challenged act.'" [160] An official's conduct is objectively unreasonable, and not eligible for qualified immunity, "when no officer of reasonable competence could have made the same choice in similar circumstances." [161]

### G. The *Rooker-Feldman* Doctrine

In *Rooker v. Fidelity Trust Co.*, the Supreme Court held that federal district courts "lacked the requisite appellate authority, for their jurisdiction was 'strictly

original.' Among federal courts, the *Rooker* Court clarified, Congress had empowered only [the Supreme Court] to exercise appellate authority 'to reverse or modify' a state-court judgment." [162] In *District of Columbia Court of Appeals v. Feldman*, the Court further clarified that state court proceedings that were "judicial in nature" were reviewable only by the Supreme Court or by the highest court of the state. [163] A denial of bar admission to two men who had not graduated from ABA accredited law schools by the Court of Appeals for the District of Columbia was considered a proceeding that was "judicial in nature" by the *Feldman* Court, and therefore not reviewable by the district court. [164]

## IV. DISCUSSION

### A. Immunity

#### 1. The Eleventh Amendment

The State of New York has not consented to be sued in these actions and Congress has not abrogated state immunity for plaintiffs' claims. Therefore, this Court has no jurisdiction to hear any claims against the State. Similarly, the Appellate Divisions of the New York State Supreme Court are an arm of the State of New York. [165] All claims against these defendants are therefore dismissed.

The New York State Legislature has vested the exclusive jurisdiction to discipline attorneys in the four departments of the Appellate Division of the Supreme Court. [166] The Departments have delegated to the Departmental Disciplinary Committees their judicial function of investigating charges of attorney

misconduct. [167] Accordingly, each Committee, like the disciplinary and grievance committees in other jurisdictions, "is a delegatee of the powers of the Appellate Division as an aid to that Court in carrying out its statutory functions." [168] The DDCs are thus arms of the State. All claims against them are dismissed because they are immune from suit under the Eleventh Amendment. Similarly, the OCA; SCJC; and New York State Grievance Committee, Ninth Judicial District are arms of the State of New York. All claims against these defendants are dismissed as well.

**b. Judicial and Quasi-Judicial Immunity**

Plaintiffs have alleged that various judges of the New York court system have failed to uphold their judicial responsibilities in various ways, either by acting negligently or through malicious actions. Even if this were true, the alleged wrongdoings took place in the context of judicial proceedings where the courts had at least arguable jurisdiction over the relevant matters. Therefore, all suits against judges of the New York State court system for damages are dismissed.

Further, individuals who are not judges but "who perform functions closely associated with the judicial process" are protected by quasi-judicial immunity. [169] For these reasons, all claims for damages against Cahill, Cohen, Friedberg, Taub, other members of the DDC, and surrogates appointed by the court system are dismissed.

**B. Failure to Investigate**

Many of the defendants in these suits are accused of failing to investigate various allegations. However, as discussed above, there is no constitutional right to have

the government investigate an allegation of wrongdoing. [170] Therefore, all constitutional claims for failure to investigate or pursue grievances are dismissed.

### C. The *Rooker-Feldman* Doctrine

Several plaintiffs essentially ask the Court to review the decisions of the courts of the State of New York. The Court lacks jurisdiction to do so. Pursuant to the *Rooker-Feldman* doctrine, only the Supreme Court has appellate jurisdiction over state courts. If plaintiffs are correct that the state courts acted unconstitutionally, their proper recourse is to appeal to the higher courts of the state and then, if necessary, to the United States Supreme Court.

### D. Standing

Several of plaintiffs' claims relate to the alleged failure of various defendants to take appropriate steps in various attorney disciplinary procedures. A non-party generally has no legally protected interest that is affected by such failure. In the absence of such an interest, a plaintiff has no standing to assert a claim. [171] Because they have no cognizable interest in having criminal or civil proceedings brought by the Government against the various defendants, plaintiffs cannot state a claim against government officials for failing to initiate those proceedings.

Capogrosso asserts that section 44 of the New York Judiciary Law is unconstitutional in that it "violates the Equal Protection and Due Process clauses of the U.S. Constitution both on its face and as applied to plaintiff." [172] However, as discussed above, Capogrosso's

constitutional rights have not been violated because she has no federal constitutional right to have her grievances investigated. Because Capogrosso has suffered no injury from this alleged constitutional violation, she has no standing to assert that the statute is unconstitutional. This claim is therefore dismissed.

**E. Failure to Allege Wrongdoing**

Rule 8(a) does not impose a substantial pleading burden on a plaintiff. The complaint need only state sufficient facts to put the defendant on notice of the conduct at issue. However, allegations of fraud must be pled pursuant to Rule 9(b), which imposes a heightened pleading standard. Plaintiff McCormick, who alleges that certain defendants have committed fraud, has failed to meet even the burden imposed by Rule 8(a). Her Complaint names as defendants Winthrop Rutherfurd, Jr. and David G. Keyko, who are alleged to be attorneys admitted to practice in New York. [173] However, it fails to provide specificity as to the actions they took to incur liability. The only relevant paragraph states that "Plaintiff obtained confirming evidence showing an organized and systematic fraud by the defendants involving more than $ 37 million and the falsification of official court records." [174] For this reason, McCormick has failed to state a claim against Rutherford and Keyko.

Similarly, Petrec-Tolino has failed to identify any action taken by Taub other than the administrative intake of his grievance petitions. He fails to allege that she took any action that infringed on his constitutional rights. His claims against her are therefore dismissed. Similarly, Petrec-Tolino fails to allege the existence of an enterprise other than a description, in the most

nebulous and conclusory terms, of a conspiracy among Eisenberg and the New York court system. His RICO claims are therefore dismissed.

### F. Supplemental Jurisdiction and Leave to Replead

When a plaintiff has not alleged diversity jurisdiction and her federal claims fail as a matter of law, courts generally decline to exercise supplemental jurisdiction over remaining state law claims. [175] In these cases, all federal law claims have been dismissed and there is no reason to depart from this general rule. I therefore dismiss plaintiffs' state law claims. Plaintiffs' underlying disputes are more appropriate for litigation in state court.

A pro se plaintiff should be permitted to amend her complaint prior to its dismissal for failure to state a claim "unless the court can rule out any possibility, however unlikely it might be, that an amended complaint would succeed in stating a claim." [176] However, "it is well established that leave to amend a complaint need not be granted when amendment would be futile." [177] Because plaintiffs have not suffered any wrongs that can be addressed in federal district court, leave to replead is denied. [178]

## V. CONCLUSION

For the reasons stated above, defendants' motions to dismiss are granted and certain claims and defendants are dismissed sua sponte. [179] The Clerk of the Court is directed to close these and related motions (in case no. 07 Civ. 11612, documents no. 41, 46, 49, 51, 65, and 66; and in case no. 08 Civ. 2391, document no. 19) and these cases.

/s/ Shira A. Scheindlin

Shira A. Scheindlin

U.S.D.J.

Dated: New York, New York

August 8, 2008

Footnotes

1 07 Civ. 9599 (S.D.N.Y. filed Oct. 26, 2007).

2 The facts in this section are taken from Esposito's Second Amended Complaint ("*Esposito* Compl.") and are assumed to be true for purposes of this motion.

3 *See id.* 1120.

4 *See id.* ¶ 21.

5 *See id.* ¶ 22.

6 *See id.* ¶ 23.

7 In October or November of 2005, Esposito filed a grievance with the 7 *See id.* ¶ 25.

8 *Id.* ¶ 26.

9 *Id.*

10 *See id.* ¶ 29.

11 *See id.* ¶ 27.

12 *See id.* ¶ 28.

13 *See id.* ¶ 30.

14 *See id.* ¶ 34.

15 *See id.* ¶ 36.

16 *See id.* ¶ 37.

17 *See id.* ¶ 44.

18 The facts in this section are taken from McKeown's Complaint ("*McKeown* Compl.") and are assumed to be true for purposes of this motion.

19 *See id.* ¶ 30.

20 *See id.* ¶ 32.

21 *See id.* ¶ 33.

22 *See id.* ¶ 37. The Complaint does not make clear what the purpose of this order was.

23 *Id.* ¶ 41.

24 *Id.* P 50.

25 *See id.* ¶ 58.

26 *Id.* ¶ 61. The Complaint actually reads, "If you don't simply forget about the fu$ # ing assignment . . . ." While the Court appreciates plaintiff's efforts to spare

the parties' sensibilities, such concerns do not outweigh the importance of accuracy and precision.

27 *Id.* ¶ 63.

28 *See id.* ¶ 67.

29 *Id.* ¶ 68.

30 *See id.* ¶ 73.

31 *See id.* ¶ 74.

32 *Id.* ¶¶ 77-79.

33 *See id.* ¶ 81.

34 *See id.* ¶¶ 69, 71.

35 *See id.* ¶ 86.

36 *Id.* ¶ 90.

37 *Id.* ¶ 101.

38 Issues relating to the estate of Tom Carvel have been heavily litigated in this and other courts. *See, e.g., Estate of Carvel ex rel. Carvel v. Ross*, 566 F. Supp. 2d 342, 2008 U.S. Dist. LEXIS 54455, 2008 WL 2794806 (D. Del. 2008); *In re Carvel*, 49 A.D.3d 877, 853 N.Y.S.2d 902 (2d Dep't 2008); *Carvel v. Carvel Found. Inc.*, 230 Fed. App'x 103 (2d Cir. 2007), *cert. denied*, ___ U.S. ___, 128 S. Ct. 1658, 170 L. Ed. 2d 356 (2008); *Carvel v. Godley*, 939 So. 2d 204 (Fla. App. 4th Dist. 2006); *In re Carvel*, 23 A.D.3d 462, 808 N.Y.S.2d 100 (2d Dep't

2005); *In re Carvel*, 303 A.D.2d 405, 755 N.Y.S.2d 851 (2d Dep't 2003), *leave to appeal denied*, 3 N.Y.3d 604, 817 N.E.2d 824, 784 N.Y.S.2d 6 (2004); *In re Carvel*, 2 A.D.3d 847, 769 N.Y.S.2d 402 (2d Dep't 2003); *Carvel v. Godley*, 41 F. Supp. 2d 476 (S.D.N.Y. 1999); *In re Thomas & Agnes Carvel Found.*, 36 F. Supp. 2d 144 (S.D.N.Y.), *app. dismissed*, 188 F.3d 83, (2d Cir. 1999); *Carvel v. Arcadipane*, 242 A.D.2d 314, 661 N.Y.S.2d 982 (2d Dep't 1997).

39 Except where indicated, the facts in this section are taken from the Amended Complaint ("*Carvel* Compl.") and are assumed to be true for purposes of this motion.

40 *See* Jeffrey B. Gale, The Smithsonian Institute, *Carvel Ice Cream Records, 1934-1989* (1993), *available at* http://americanhistory.si.edu/archives/d7488.htm.

41 *See* id.

42 *See Carvel* Compl. ¶ 49.

43 *See id.*

44 *See id.* ¶ 50.

45 *See id.* ¶ 52.

46 *See id.* 62.

47 *See id.* ¶ 64.

48 *See id.* ¶ 66.

49 *See id.* ¶ 117.

50 *id.* ¶ 72

51 *Id.* ¶ 125.

52 *See id.* ¶ 126.

53 *See id.* ¶ 129.

54 *See id.* ¶ 70.

55 *See id.* ¶ 75.

56 *See id.* ¶ 84.

57 *See id.* ¶ 89.

58 *See id.* ¶ 95.

59 *See id.* ¶ 101.

60 *See id.* ¶ 105.

61 *Id.* ¶ 108.

62 *See id.* ¶ 136.

63 *See id.* ¶ 141.

64 *See id.* ¶ 145.

65 *See id.* ¶ 150.

66 The facts in this, section are taken from McCormick's Complaint ("McCormick Compl.") and are assumed to be true for purposes of this motion.

67 Attorneys Winthrop Rutherford, Jr. and David G. Keyko were involved with the administration of the estate of her late husband.

68 *See id.* ¶ 12.

69 *See id.* ¶¶ 12, 15-16.

70 *Id.* ¶ 18.

71 Id. ¶ 38.

72 The facts in this section are taken from Capogrosso's Amended Complaint ("*Capogrosso* Compl.") and are assumed to be true for purposes of this motion.

73 *Id.* ¶¶ 31-32.

74 *See id.* ¶¶ 34-36.

75 *See id.* ¶¶ 37-39.

76 *See id.* ¶ 46.

77 *See id.* ¶ 47.

78 *See id.* ¶¶ 75-76.

79 *Id.* ¶ 92. Capogrosso does not explain why it was necessary for her to leave the country.

80 *See id.* ¶ 94.

81 *See id.* ¶¶ 96-99.

82 *See id.* ¶ 102.

83 *See id.* ¶ 106.

84 *See id.* ¶¶ 109, 112.

85 *See id.* ¶ 114.

86 *See id.* ¶ 67

87 *See id.* ¶ 79.

88 *See id.* ¶ 90.

89 *See id.* ¶ 121.

90 *See id.* ¶ 123.

91 *Id.* ¶ 78.

92 *See id.* ¶ 129.

93 *See id.* ¶ 130 ("Defendant Bransten improperly granted a motion for plaintiff's counsel to withdraw that plaintiff was a party [sic] on the basis of her longstanding friendship with the attorney of record.").

94 *See id.* ¶¶ 132-133.

95 *Id.* ¶ 167.

96 *Id.* ¶ 175.

97 N.Y. Jud. L. § 44.

98 The facts in this section are taken from Petrec-Tolino's Amended Complaint ("Petrec-Tolino Compl.") and are assumed to be true for purposes of this motion.

99 *See id.* ¶ 3.

100 *See id.* ¶ 17.

101 *See id.* ¶ 18.

102 *Id.* ¶ 20.

103 *See id.* ¶ 21.

104 *See id.* ¶ 26.

105 *See id.* ¶ 29.

106 *See id.* ¶ 31.

107 *See id.* ¶ 32 ("By misrepresenting Plaintiff, Cahill, Cohen and Friedberg are in violation of DR 1-102, as is Rebecca Taub who intakes all complaints, etc.").

108 *Id.* ¶ 12.

109 *Id.* ¶ 13.

110 *Erickson v. Pardus*, 551 U.S. 89, 127 S. Ct. 2197, 2200, 167 L. Ed. 2d 1081 (2007) (quoting Fed. R. Civ. P. 8(a)(2)).'

111 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1964, 167 L. Ed. 2d 929 (2007).

112 *Ofori-Tenkorang v. American Int 'l Group*, 460 F.3d 296, 298 (2d Cir. 2006).

113 *Patel v. Contemporary Classics of Beverly Hills*, 259 F.3d 123, 126 (2d Cir. 2001) (citing *Irish Lesbian & Gay Org. v. Giuliani*, 143 F.3d 638, 644 (2d Cir. 1998)).

114 *Bell Atl.*, 127 S. Ct. at 1970.

115 *Id.* at 1964. *See also ATSI Commc'ns v. Shaar Fund*, Ltd., 493 F.3d 87, 98 n.2 (2d Cir. 2007) (applying the standard of plausibility outside *Bell Atlantic's* anti-trust context).

116 *Iqbal v. Hasty*, 490 F.3d 143, 157-58 (2d Cir. 2007) (holding that the plaintiff's complaint adequately alleged the personal involvement of the Attorney General because it was plausible that officials of the Department of Justice would be aware of policies concerning individuals arrested after the events of September 11, 2001).

117 *Bell Atl.*, 127 S. Ct. at 1968 (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)).

118 *ATSI Commc'ns*, 493 F.3d at 98 (quoting *Bell Atl.*, 127 S. Ct. at 1965).

119 *Allaire Corp. v. Okumus*, 433 F.3d 248, 250 (2d Cir. 2006).

120 *Law Offices of Curtis V. Trinko, L.L.P. v. Bell Atl. Corp.*, 309 F.3d 71, 74 (2d Cir. 2002) (quotation omitted).

121 *See Lerman v. Board of Elections in the City of N.Y.*, 232 F.3d 135, 140 (2d Cir. 2000). *See also Haines v. Kerner*, 404 U.S. 519, 520, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972) (providing that courts should hold "allegations of [] pro se complaint[s] . . . to less stringent standards than formal pleadings drafted by lawyers.").

122 *See Traguth v. Zuck*, 710 F.2d 90, 95 (2d Cir. 1983).

123 *Salahuddin v. Cuomo*, 861 F.2d 40, 42 (2d Cir. 1988).

124 *Id.* (quoting C. Wright & A. Miller, 5 *Federal Practice and Procedure* § 1281 (1969)).

125 *Id.*

126 *See id.* (citing *Gordon v. Green*, 602 F.2d 743, 745-47 (5th Cir. 1979), in which the court ruled that plaintiffs should have been given leave to amend a 4000-page complaint) (other citations omitted).

127 *Morris-Hayes v. Board of Educ. of Chester Union Free Sch. Dist.*, 423 F.3d 153, 159 (2d Cir. 2005) (citing *Oklahoma City v. Tuttle*, 471 U.S. 808, 816, 105 S. Ct. 2427, 85 L. Ed. 2d 791 (1985)).

128 *See Palmieri v. Lynch*, 392 F.3d 73, 78 (2d Cir. 2004).

129 *Anatian v. Coutts Bank (Switzerland) Ltd.*, 193 F.3d 85, 88 (2d Cir. 1999) (citing *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985)).

130 *See Kirk v. Heppt*, 423 F. Supp. 2d 147, 2006 WL 689510, at *2 (S.D.N.Y. 2006) ("Because the mere assertion of a RICO claim . . . has an almost inevitable stigmatizing effect on those named as defendants, . . . courts should strive to flush out frivolous RICO allegations at an early stage of the litigation.") (citations and quotation marks omitted).

131 *Goldfine v. Sichenzia*, 118 F. Supp. 2d 392, 394 (S.D.N.Y. 2000). *Accord Kirk*, 423 F. Supp. 2d 147, 2006 WL 689510, at *2 (observing that courts "must be wary of putative civil RICO claims that are nothing more than sheep masquerading in wolves' clothing"); *Schmidt v. Fleet Bank*, 16 F. Supp. 2d 340, 346 (S.D.N.Y. 1998) (noting that because civil RICO "is an unusually potent weapon -- the litigation equivalent of a thermonuclear device . . . courts must always be on the lookout for the putative RICO case that is really nothing more than an ordinary fraud case clothed in the Emperor's trendy garb").

132 *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 156, 107 S. Ct. 2759, 97 L. Ed. 2d 121 (1987).

133 *DeShaney v. Winnebago Soc. Servs.*, 489 U.S. 189, 196, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989).

134 *Nieves v. Gonzalez*, No. 05 Civ. 17, 2006 U.S. Dist. LEXIS 24302, 2006 WL 758615, at *4 (W.D.N.Y. Mar. 2, 2006) (quoting *Bal v. City of New York*, No. 94 Civ. 4450, 1995 U.S. Dist. LEXIS 1359, 1995 WL 46700, at *2 (S.D.N.Y. Feb. 7), *aff'd*, 99 F.3d 402 (2d Cir. 1995)) (alterations in *Nieves*).

135 *See Longi v. County of Suffolk*, No. CV-02-5821, 2008 U.S. Dist. LEXIS 25468, 2008 WL 858997, at *6 (E.D.N.Y. Mar. 27, 2008) ("[T]here is no constitutional right to an investigation by government officials.").

136 *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996). Although the text of the Amendment suggests that it does not prohibit a citizen from suing his own state in federal court, the Supreme Court has explained that the Amendment clarifies that the States enjoy broad sovereign immunity, including immunity in federal court from suits brought by their citizens. *See Hans v. Louisiana*, 134 U.S. 1, 10 S. Ct. 504, 33 L. Ed. 842 (1890).

137 *In re Deposit Ins. Agency*, 482 F.3d 612, 617 (2d Cir. 2007) (citing *Northern Ins. Co. of N.Y. v. Chatham County, Ga.*, 547 U.S. 189, 126 S. Ct. 1689, 164 L. Ed. 2d 367 (2006); *Edelman v. Jordan*, 415 U.S. 651, 663, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974)).

138 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908).

139 *State Employees Bargaining Agent Coal. v. Rowland*, 494 F.3d 71, 95 (2d Cir. 2007) (quoting *In re Deposit Ins. Agency*, 482 F.3d at 617).

140 *See id.* at 96 ("We are specifically required by *Ex parte Young* to examine whether there exists an ongoing violation of federal law.") (citing *Verizon Md., Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, 645, 122 S. Ct. 1753, 152 L. Ed. 2d 871 (2002)).

141 *Woods v. Rondout Valley Central School Dist. Bd of Educ.*, 466 F.3d 232, 237 (2d Cir. 2006) (quoting *Gragg v. Kentucky Cabinet for Workforce Dev.*, 289 F.3d 958, 963 (6th Cir. 2002) (citations omitted)).

142 *Id.* at 240 (quoting *Mancuso v. New York State Thruway Auth.*, 86 F.3d 289, 293 (2d Cir. 1996)).

143 *Id.* (citing *Mancuso*, 86 F.3d at 293).

144 *Id.* at 241.

145 *Montero v. Travis*, 171 F.3d 757, 760 (2d Cir. 1999).

146 *Roe v. Johnson*, 334 F. Supp. 2d 415, 423 (S.D.N.Y. 2004) (citing *Cleavinger v. Saxner*, 474 U.S. 193, 200, 106 S. Ct. 496, 88 L. Ed. 2d 507 (1985)(hearing examiners and administrative law judges); *Montero*, 171 F.3d at 760 (parole board officials); *Oliva v. Heller*, 839 F.2d 37, 40 (2d Cir. 1988) (law clerks)).

147 *Pierson v. Ray*, 386 U.S. 547, 554, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1967).

148 *Huminski v. Corsones*, 396 F.3d 53, 75 (2d Cir. 2005). *Accord Stump v. Sparkman*, 435 U.S. 349, 356-57, 98 S. Ct. 1099, 55 L. Ed. 2d 331 (1978) ("A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the 'clear absence of all jurisdiction.'").

149 *See Sassower v. Mangano*, 927 F. Supp. 113, 120 (S.D.N.Y. 1996) ("Under the doctrine of quasi-judicial

immunity, absolute immunity extends to administrative officials performing discretionary acts of a judicial nature.").

150 *Middlesex County Ethics Comm. v. Garden State Bar Assoc.*, 457 U.S. 423, 433-34, 102 S. Ct. 2515, 73 L. Ed. 2d 116 (1982) ("It is clear beyond doubt that the New Jersey Supreme Court considers its bar disciplinary proceedings as 'judicial' in nature.").

151 *See Pulliam v. Allen*, 466 U.S. 522, 541-42, 104 S. Ct. 1970, 80 L. Ed. 2d 565 (1984) ("We conclude that judicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in her judicial capacity.").

152 *Velez v. Levy*, 401 F.3d 75, 100 (2d Cir. 2005) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)).

153 *Locurto v. Safir*, 264 F.3d 154, 162-63 (2d Cir. 2001) (quoting *Kaminsky v. Rosenblum*, 929 F.2d 922, 924-25 (2d Cir. 1991)).

154 *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986).

155 *Williams v. City of Mount Vernon*, 428 F. Supp. 2d 146, 153 n.2 (S.D.N.Y. 2006).

156 *Mitchell v. Forsyth*, 472 U.S. 511, 556 n.10, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985) (Brennan, J., concurring in part and dissenting in part) (citing *Brandon v. Holt*, 469 U.S. 464, 472-73, 105 S. Ct. 873, 83 L. Ed. 2d 878 (1985)).

157 *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001).

158 *See id.*

159 *Anderson v. Recore*, 317 F.3d 194, 197 (2d Cir. 2003)(quoting *Young v. County of Fulton*, 160 F.3d 899, 903 (2d Cir. 1998)) (alterations in *Anderson*).

160 *Anthony v. City of N.Y.*, 339 F.3d 129, 137 (2d Cir. 2003) (quoting *Lennon v. Miller*, 66 F.3d 416, 420 (2d Cir. 1995)).

161 *Id.* at 138 (quotation marks omitted).

162 *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284, 125 S. Ct. 1517, 161 L. Ed. 2d 454 (2005)(internal citations omitted). *Accord Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416, 44 S. Ct. 149, 68 L. Ed. 362 (1923).

163 *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 476, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983). *Accord Exxon Mobil*, 544 U.S. at 285.

164 *Feldman*, 460 U.S. at 479-82.

165 *See* N.Y. Const. art. 6, § 1. Further, neither the State nor the Appellate Division can be sued under section 1983 because they are not "persons." *See Zuckerman v. Appellate Div., Second Dep't, Supreme Court of State of N.Y.*, 421 F.2d 625, 626 (2d Cir. 1970) ("[I]t is quite clear that the Appellate Division is not a 'person' within the meaning of 42 U.S.C. § 1983. . . .

[T]he state itself is also not subject to suit under section 1983.") (citation omitted).

166 The Judiciary Law of the State of New York states:

> The supreme court shall have power and control over attorneys and counsellors-at-law and all persons practicing or assuming to practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice; and the appellate division of the supreme court is hereby authorized to revoke such admission for any misrepresentation or suppression of any information in connection with the application for admission to practice.

N.Y. Judiciary Law § 90(2).

167 New York State regulations state as follows:

> This court shall appoint a Departmental Disciplinary Committee for the Judicial Department, which shall be charged with the duty and empowered to investigate and prosecute matters involving alleged misconduct by attorneys who, and law firms that, are subject to this Part and to

impose discipline to the extent permitted by section 603.9 of this Part.

N.Y. Comp. Codes R. & Regs., tit. 22, § 603.4(a).

168 *Rapoport v. Departmental Disciplinary Comm. for First Judicial Dep't*, No. 88 Civ. 5781, 1989 U.S. Dist. LEXIS 13854, 1989 WL 146264, at *1 (S.D.N.Y. Nov. 21, 1989).

169 *See Oliva*, 839 F.2d at 39.

170 For this reason, these defendants are also entitled to qualified immunity.

171 *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992).

172 *Capogrosso* Compl. ¶ 249.

173 *See McCormick* Compl. ¶ 11.

174 *Id.* ¶ 12.

175 *See* 28 U.S.C. § 1367(c)(3) (stating that a district court may decline to exercise supplemental jurisdiction over a claim if, *inter alia*, "the district court has dismissed all claims over which it has original jurisdiction"). *See also Martinez v. Simonetti*, 202 F.3d 625, 636 (2d Cir. 2000) (directing dismissal of state law claims when no federal claims remained); *Adams v. Intralinks, Inc.*, No. 03 Civ. 5384, 2004 U.S. Dist. LEXIS 13678, 2004 WL 1627313, at *8 (S.D.N.Y. July 20, 2004) ("In the usual case in which all federal law claims are eliminated before trial, the balance of factors

to be considered under the [supplemental] jurisdiction doctrine-judicial economy, convenience, fairness, and comity-will point toward declining to exercise jurisdiction over the remaining state law claims.") (quotation and citation omitted).

176 *Gomez v. USAA Fed. Sav. Bank*, 171 F.3d 794, 796 (2d Cir. 1999).

177 *Ellis v. Chao*, 336 F.3d 114, 127 (2d Cir. 2003).

178 Normally, McCormick would be permitted to amend her Complaint to expand her allegations against Rutherford and Keyko. However, her Complaint does not suggest that she could raise any cause of action against these defendants that would be cognizable in federal court.

179 I note the Second Circuit's warning that "failure to afford an opportunity to oppose a contemplated sua sponte dismissal may be, 'by itself, grounds for reversal.'" *Abbas v. Dixon*, 480 F.3d 636, 640 (2d Cir. 2007) (quoting *Acosta v. Artuz*, 221 F.3d 117, 124 (2d Cir. 2000)). However, the Circuit has also noted that it is not bad practice to do so where "'it is unmistakably clear that the court lacks jurisdiction, or that the complaint lacks merit or is otherwise defective . . .'" *Id.* (quoting *Mojias v. Johnson*, 351 F.3d 606, 610-11 (2d Cir.2003)). For the reasons discussed above, these cases fall into that category.

Filed 8/27/08
08 Civ. 5455 (SAS)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

ELEANOR CAPOGROSSO,
Plaintiff,
- against -
THE NEW YORK STATE COMMISSION ON JUDICIAL CONDUCT, et al.,
Defendants.

ORDER

SHIRR A. SCHEINDLIN, U.S.D.J.:

By Opinion and Order dated August 8, 2008, this Court dismissed plaintiff's claims sua sponte. Plaintiff now moves for reconsideration of that Opinion and Order.

"The standard for granting such a motion is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked - matters, in other words, - that might reasonably be expected to alter the conclusion reached by the court."[1] Plaintiff raises a number of grounds for reconsideration.

Plaintiff first asserts that defendant judges are not entitled to judicial immunity because they committed crimes, namely obstruction of justice, conspiracy to obstruct justice, and perjury.[2] Plaintiff is incorrect. The judicial actions that are the subject of plaintiff's Complaint were clearly taken in the context of judicial pro-

ceedings over which the defendant judges had clear jurisdiction. They are thus entitled to immunity for those actions. If plaintiff is not satisfied with the decisions made by a court in a matter in which it has jurisdiction, her remedy is to appeal, not sue the judge.

Plaintiff next contends that the Court's analysis of defendants' immunity was erroneous because it failed to apply the exception to sovereign immunity first discussed in Ex Parte Young, which permits courts to award injunctive relief in certain circumstances.[3] However, as discussed in the Opinion and Order, plaintiff failed to identify an ongoing violation of a constitutional right that could be addressed by this Court through injunctive relief.[4]

Plaintiff also argues that the Court misapplied the Rooker-Feldman doctrine. She reasons that the doctrine applies only to parties that have "lost" in state court, and she did not "lose" her constitutional claims in state court.[5] Plaintiff has confused the requirements of the doctrine. Rooker-Feldman prevents federal courts from exercising appellate jurisdiction over state courts regardless of the form the action takes. Plaintiff's federal claims are barred because she asks this Court to overturn state court decisions, not because the federal claims themselves were already determined by a state court. The latter is an example of claim preclusion, not the Rooker-Feldman doctrine.

Plaintiff also argues that the Rooker-Feldman doctrine is inapplicable to the State Commission on Judicial Conduct because it is an administrative body and argues that the Court has jurisdiction to review the Commission's decision to dismiss complaints against

various judges.[6] As discussed in this Court's Opinion and Order, plaintiff has no standing to raise this claim.[7] Similarly, plaintiff has no standing to challenge the constitutionality of section 44 of the New York Judiciary Law.[8]

Plaintiff has not identified any material facts or law overlooked by the Court. Reconsideration is therefore denied.

SO ORDERED:

SHIRR A. SCHEINDLIN, U.S.D.J.

Footnotes

1 Shrader v. CSX Transp., Inc., 70 F.3d 255, 257 (2d Cir. 1995). Accord In re BDC 56 LLC, 330 F.3d 111, 123 (2d Cir. 2003); Eisemann v. Greene, 204 F.3d 393, 395 n.2 (2d Cir. 2000) ("To be entitled to reargument, a party must demonstrate that the Court overlooked controlling decisions or factual matters that were put before it on the underlying motion." (quotation omitted)).

2 See Memorandum in Support of Motion for Reconsideration ("Pl. Mem.") at 2.

3 209 U.S. 123 (1908).

4 See Opinion and Order at 46.

5 See Pl. Mem. at 6.

6 See id.

7 See Opinion and Order at 47.

8 See id.

Filed 12/29/2009

No. 08-4719-cv

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ELEANOR CAPOGROSSO, Plaintiff-Appellant,

v.

NEW YORK STATE COMMISSION ON JUDICIAL CONDUCT, STATE OF NEW YORK, OFFICE OF COURT ADMINISTRATION, HON. FERN FISHER BRANDVEEN, IN HER OFFICIAL AND INDIVIDUAL CAPACITIES, HON. EILEEN BRANSTEN, IN HER OFFICIAL AND INDIVIDUAL CAPACITIES, HON. JOHN T. BUCKLEY, IN BOTH HIS OFFICIAL AND INDIVIDUAL CAPACITIES, HON. JOAN CAREY, IN HER OFFICIAL AND INDIVIDUAL CAPACITIES, SHERRY K. COHEN, IN HER OFFICIAL AND INDIVIDUAL CAPACITIES, PAUL CURRAN, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES, HON. CAROL R. EDMEAD, IN HER OFFICIAL AND INDIVIDUAL CAPACITIES, RAOUL FELDER, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES, HON. JUDITH GISCHE, IN HER OFFICIAL AND INDIVIDUAL CAPACITIES, SARAH JO HAMILTON, IN HER OFFICIAL AND INDIVIDUAL CAPACITIES, HON. DEBRA JAMES, IN HER OFFICIAL AND INDIVIDUAL CAPACITIES, HON. JUDITH S. KAYE, IN HER OFFICIAL AND INDIVIDUAL CAPACITIES, HON. JOAN M. KENNEY, IN HER OFFICIAL AND INDIVIDUAL CAPACITIES, CATHERINE O'HAGAN WOLFE, IN HER OFFICIAL AND INDIVIDUAL CAPACITIES, HON. K. JEFFREY

OING, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES, HON. EILEEN A. RAKOWER, IN HER OFFICIAL AND INDIVIDUAL CAPACITIES, SHERILL SPATZ, IN HER OFFICIAL AND INDIVIDUAL CAPACITIES, HON. MARTIN A. SHULMAN, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES, HON. GEOFFREY D. WRIGHT, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES, JOHN DOE 1-20, JANE DOE 1-20, THE APPELLATE DIVISION, FIRST DEPARTMENT, DEPARTMENTAL DISCIPLINARY COMMITTEE, THOMAS J. CAHILL, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES, Defendants-Appellees.

Eleanor Capogrosso having filed a petition for panel rehearing, or, in the alternative, for rehearing en banc, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing en banc,

IT IS HEREBY ORDERED that the petition is denied.

For the Court,

Catherine O'Hagan Wolfe, Clerk
s/Frank Perez, Deputy Clerk